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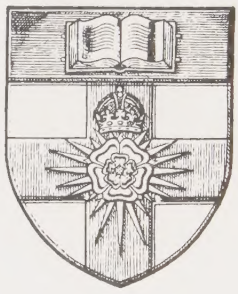

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

AUGUST 15, 1938, TO APRIL 15, 1940.

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW.

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BEFORE

MR. JUSTICE BRANSON, MR. JUSTICE DU PARCQ AND MR. JUSTICE WROTTESLEY.

HUGH CHARLES MORRISON.

1938.
15 *August.*

Bigamy—Alleged Invalidity of First Marriage—Husband of Lawful Wife Alleged to be Living—Question for Jury—Proper Direction.

The appellant, who was charged with bigamy, alleged that his first marriage was invalid by reason of the fact that his wife had been previously married and that her first husband was still living. The appellant's wife gave evidence that she had been married in 1919; that she and her first husband had gone to Canada; that she last saw her first husband in 1928; and that, prior to her marriage with the appellant in March, 1938, she had informed the Registrar who performed the ceremony of those facts, and had been told by him that she could properly describe herself as a widow. The Judge directed the jury that, the appellant's first marriage being *prima facie* lawful, it was for them to consider the whole of the evidence, and that if they had doubt about its lawfulness, they should acquit the appellant.

Held, the direction was correct in law.

WILLSHIRE (1881), 6 Q. B. D. 366, applied.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on July 9, 1938, of bigamy, and was sentenced by Humphreys, J., to fifteen months' imprisonment with hard labour.

The appellant married his lawful wife on March 11, 1938, and on March 16, 1938, went through a form of marriage with Florence Ide. At the trial he raised the defence that the first marriage was invalid by reason of the fact that his lawful wife had been previously married to a husband who was still living.

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15 *August.*

HUGH CHARLES MORRISON.

Branson, J., du Parcq, J., Wrottesley, J.

The appellant's wife gave evidence that she had married her first husband in June, 1919; that they had gone to Canada; that she last saw her first husband in Canada in 1928, and that he was then forty-four years of age; and that prior to her marriage to the appellant, she had informed the Registrar who performed the ceremony of those facts, and had been told by him that she could properly describe herself as a widow. She was cross-examined on the basis that she had never mentioned the circumstances of her previous marriage, and in re-examination she stated that she mentioned them in a statement which she had made to the Bicester police. That statement was not produced.

H. J. Browne, for the appellant:

It was for the prosecution to establish that the appellant's wife's first marriage was not subsisting. The Judge ought to have told the jury that before they found the appellant guilty they must be satisfied that his wife's first husband was dead. That question was one of fact for the jury to determine (WILLSHIRE (1881), 6 Q. B. D. 366, *per* Lord Coleridge, C.J., at p. 369), but it was not left to the jury in this case. The summing-up is also contrary to the opinions expressed in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, [1935] A. C. 462; 25 Cr. App. R. 72. Further, the Judge told the jury that the defence was first raised in July, whereas in fact the appellant's wife had made a statement to the police early in April, and this also prejudiced the appellant in the eyes of the jury.

Eric Neve, for the Crown, was not called upon.

BRANSON, J.: This appellant was convicted at Sussex Assizes of bigamy, and was sentenced to fifteen months' imprisonment with hard labour. He now appeals against his conviction, and contends that the Judge misdirected the jury in certain respects. His chief allegation, and the only one which has been argued, is that the Judge left the jury

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15 *August.*

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under the impression that it was for the defendant to establish his defence.

[His Lordship referred to the facts as set out above, and continued:] The allegation is that the Judge should have told the jury in so many words that, unless they were satisfied that Mr. Holman was dead at the time of the appellant's first marriage, they should acquit the defendant, and should convict only if they were satisfied that Mr. Holman was already dead. The Judge in fact began by telling the jury that the defence had raised this matter, and went on to say: "They say that, although the defendant in this case did go through a ceremony of marriage with Mrs. Holman on March 11, and although he believed at that time that it was a lawful marriage, it now turns out—and they say they are able to prove it—that it was not a marriage at all, because she was not free to marry, as she had a husband living." He went on to point out that, if the defence could have produced the husband, that would have been an end of the case, because it would then have been established that Mrs. Holman had a husband living when she went through a form of marriage with the appellant on March 11, but that Mr. Holman had not been called. He then went on to discuss the question of law, and referred to the decision of the Court for Crown Cases Reserved in WILLSHIRE (1881), 6 Q. B. D. 366, in the following terms: "The Court for Crown Cases Reserved said . . . that what the Judge ought to have done was to leave it to the jury, on the evidence of both sides, for them to say what the facts were and what they believed in the matter." Then he proceeded to give a direction which seems to put the matter fairly and clearly to the jury and to be as favourable to the appellant as it could be. He said: "The marriage between the defendant and Mrs. Holman being *prima facie* a lawful marriage, do you entertain any doubt about its lawfulness in consequence of the evidence you have heard? If you think it may have been no marriage at all, then the

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15 *August.*

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prosecution will not have proved that this man had two wives at the same time, but only one, Mrs. Ide, because the first woman was not his wife, if that is the view you take of the matter."

It appears to us that in that passage the Judge told the jury the precise point which they had to consider, and told them in perfectly clear language that, if they had any doubt about the first marriage, they must acquit the defendant. It is said that in other passages in the summing-up that direction was whittled away. When, however, the Judge again discussed the facts with regard to Mrs. Holman, he said: "Has [the defence] been made out? Do you believe it? That is the question. According to whether you find the story credible or incredible, it may be that your verdict will go." That amounts to telling the jury that, if they think the story credible, notwithstanding that they may not believe it all, they should acquit.

[His Lordship referred to another passage in the summing-up, and continued:] The effect of what the Judge said was to tell the jury that, if any uncertainty or doubt had been raised in their minds, they were to act in accordance with what he had already told them was the law. In our view, the summing-up adequately directed the jury on the law, and the contention that the appeal should be allowed on the ground of misdirection fails.

[His Lordship went on to say that there was no substance in another ground of appeal based on the contention that the jury might have felt some doubt by reason of the non-production of the statement made by Mrs. Holman to the Bicester police.]

The result is that this appeal must be dismissed.

Appeal dismissed.

Solicitors: Hillman & Sons, Lewes, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE MACNAGHTEN.

JOHN JOSEPH HOWELL.

1938.
18 *October.*

Verdict—Dangerous Driving—"Guilty of Dangerous Driving owing to an Error of Judgment"—Conviction Quashed.

On a trial for manslaughter, the Judge, when dealing with the possibility of a conviction of dangerous driving, directed the jury: "If you think that [the prisoner] was guilty of a mere error of judgment, then you should find him not guilty." The foreman of the jury, having stated that the jury found the prisoner not guilty of manslaughter, was asked by the Clerk of Assize: "Do you find [the prisoner] guilty or not guilty of dangerous driving?" and replied: "Yes, we find him guilty of dangerous driving owing to an error of judgment." The Judge then said: "You have heard the direction that I gave you. The question is whether you find him guilty or not guilty of dangerous driving," and the foreman replied: "Guilty of dangerous driving."

Held, the appellant was entitled to an acquittal on the verdict of the jury, and the conviction must be quashed.

Appeal against conviction (on certificate).

The appellant was convicted at Birmingham Assizes on July 27, 1938, of dangerous driving and was sentenced by Lawrence, J., to four months' imprisonment in the Second Division.

The appellant was indicted for manslaughter, and in the course of his summing-up Lawrence, J., when dealing with the possibility of a verdict of guilty of dangerous driving under section 34 of the Road Traffic Act, 1934, directed the jury: "If you think that [the prisoner] was guilty of a mere error of judgment, then you should find him not guilty."

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When the jury returned into the Court after retiring, the following questions were put and answers given:

The Clerk of Assize: Members of the jury, are you agreed on your verdict?

The Foreman: Yes.

The Clerk of Assize: Do you find the prisoner guilty or not guilty of manslaughter?

The Forman: Not guilty.

The Clerk of Assize: Do you find him guilty or not guilty of dangerous driving?

The Foreman: Yes, we find him guilty of dangerous driving owing to an error of judgment.

Mr. Smallwood (counsel for the prisoner): My Lord, will your Lordship hear me on that?

LAWRENCE, J.: You have heard the direction that I gave you. The question is whether you find him guilty or not guilty of dangerous driving.

The Foreman: Guilty of dangerous driving.

The Judge gave a certificate that the case was one fit for appeal, on the question "whether the accused was properly convicted on the answers of the jury".

Richard Elwes, for the appellant:

On the verdict of the jury the appellant was entitled to an acquittal, or at least it can be contended that the verdict was ambiguous, and that proper steps were not taken to resolve the ambiguity. In the jury's first answer the first part of the sentence is a direct antithesis to the second, especially in view of the express direction in the summing-up that if the jury thought that the appellant was guilty of a mere error of judgment, their verdict should be one of not guilty.

H. B. H. Hylton-Foster, for the Crown:

A distinction should be drawn between cause and consequence. The first part of the jury's first answer characterised the appellant's manner of driving as being dangerous in its

consequences, and the accompanying statement related to the cause of that danger. A distinction may be drawn between an error of judgment and a mere error of judgment. Any ambiguity which may have existed was properly cleared up by the Judge reminding the jury of the terms of his summing-up, and after that reminder the jury returned a specific verdict of guilty of dangerous driving.

THE LORD CHIEF JUSTICE: The argument which has been so clearly presented on both sides has been admirably brief. [His Lordship then referred to the passage in the summing-up and to the questions put to, and answers given by, the jury, which are set out above, and continued.] It is quite true that the foreman of the jury did not say "owing to a mere error of judgment", but it would seem hypercritical to read the words "owing to an error of judgment" as differing from "owing to a mere error of judgment", when a short time previously the jury had heard from the Judge the clear direction: "if you think that [the prisoner] was guilty of a mere error of judgment, then you should find him not guilty."

It seems difficult in that context and in those circumstances to escape the conclusion that the jury really meant to say: "We think the prisoner was guilty of a mere error of judgment and therefore we find him not guilty." The discussion did not, however, end there. The Judge then said: "You have heard the direction that I gave you. The question is whether you find him guilty or not guilty of dangerous driving," and the foreman then replied: "Guilty of dangerous driving." Again, when that passage is put side by side with the passage spoken a little earlier, it seems difficult to escape the conclusion that the jury meant to find that the prisoner was guilty of a mere error of judgment and in no other sense was he guilty of dangerous driving. In other words, the jury meant to say: "We know, when we look at the consequences and see the results of the event,

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that the driving was in fact dangerous, but, so far as the driver is concerned, we impute to him no more than a mere error of judgment."

It seems to us that the verdict of the jury was really free from ambiguity and that on it the appellant was entitled to be acquitted. The appeal, therefore, succeeds and the conviction is quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1938.
14 *November*.

JAMES SAMUEL JOSEPH LESTER.

Indictment—Counts for Larceny and Receiving—Direction on Larceny Only—Verdict of Guilty of Receiving—Refusal by Judge to Accept Verdict—Order that Charge of Receiving be Re-tried—Autrefois Convict—Plea Established—Sentence then Passed in Respect of Original Conviction—Conviction Quashed.

The appellant was charged on an indictment which contained counts for larceny and receiving. The Judge, considering that the evidence pointed to stealing rather than receiving, directed the jury with regard to the charge of larceny alone. The jury, however, returned a verdict of Not Guilty of larceny, but Guilty of receiving. The Judge accepted the verdict on the first count, but refused to accept the verdict on the second count, on the ground that he had not directed the jury on the law with regard to receiving, and ordered that the appellant should be properly tried on the charge of receiving at the following sessions. At the following sessions the appellant appeared before another Judge, and a plea of *autrefois convict* filed on the appellant's behalf succeeded. The Judge, however, did not forthwith discharge the appellant, but taking the view that no sentence had been passed on the appellant at the preceding sessions in respect of the conviction of receiving, proceeded to sentence him therefor.

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Held, (i) the Judge at the first trial had no power to refuse to accept the verdict of the jury, or to order what was in effect a new trial; (ii) on the plea of *autrefois convict* being established, the Judge at the second trial should have ordered the appellant to be discharged; (iii) the conviction, and the subsequent sentence in respect of it, must be quashed, as there had been no direction to the jury on the charge of receiving.

Appeal against conviction.

The appellant was charged at the County of London Sessions on September 15, 1938, before the Acting Chairman on an indictment containing two counts, the first for larceny and the second for receiving stolen property. The Acting Chairman, being under the impression that the evidence disclosed a charge of stealing rather than of receiving, directed the jury on the first count alone. The jury, however, returned a verdict of not guilty of larceny, but guilty of receiving. The Acting Chairman refused to accept the verdict on the second count, on the ground that he had not directed the jury on the law with regard to receiving, and ordered that the appellant should be properly tried on the charge of receiving at the following sessions. At the following sessions, on September 29, 1938, the appellant appeared before the Chairman, and a plea of *autrefois convict* was filed on the appellant's behalf. The Chairman, after hearing argument, directed the jury that that plea had been established, and the jury so found. The Chairman took the view that, as no sentence had been passed on the appellant in respect of the conviction of receiving at the preceding sessions, it was his duty to pass sentence therefor, and ordered the appellant to be bound over in his own recognisances for two years.

P. M. Hollins, for the appellant, was not called on to argue.

S. H. Noakes, for the Crown, did not seek to support the conviction.

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HUMPHREYS, J.: This appellant was charged at the County of London Sessions before the Acting Chairman on an indictment containing two counts, the first of which charged him with stealing, and the second with receiving stolen property. Counsel for the prosecution, counsel for the defence, and the Acting Chairman, treated the case throughout as one of stealing only, and the trial proceeded on the assumption that the charge against the appellant was that of stealing a bicycle.

When the Acting Chairman came to sum up, he discussed the evidence of stealing and the jury were directed to consider their verdict. The jury, however, returned a verdict of not guilty of stealing, but guilty of receiving. That was in fact and in law a verdict which the jury could properly return on the indictment and on the evidence. A discussion then took place in the course of which the Acting Chairman said that he felt embarrassed because he had never directed the jury on the charge of receiving. He then said that he would accept the verdict of the jury on the first count, but that he would refuse to accept the verdict on the second count because he had not told the jury what the law with regard to receiving was. Anything more contrary to law it would be difficult to imagine. No Judge has the right to say that he refuses to accept the verdict of a jury because he thinks that he ought to have directed them on the law and has failed to do so. The matter did not stop there, because the Acting Chairman proceeded to do what no one in this country has power to do, namely, to direct that there should be a new trial. The entry on the indictment is: "Not Guilty on Count 1. Verdict of Guilty on Count 2 not accepted by direction of the Court and Count 2 ordered to be tried properly at next sessions."

At the next sessions the appellant was put up for trial on the second count, and, fortunately for him, he was defended by a counsel who thoroughly understood his case and the law relating to it, and a plea of *autrefois convict*

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was filed on his behalf. The Chairman, before whom the trial on the second occasion took place, after hearing argument, held that the plea had been established, and, accordingly, directed the jury sworn to try the issue that the appellant had already been convicted of the offence wherewith he was then charged, and the jury so found. The duty of the Chairman then was to order the appellant to be discharged, but, instead of doing so, he said that there was a conviction at the last sessions still standing against the appellant in respect of which no sentence had been passed, and he proceeded to pass sentence in respect of that conviction, and ordered the appellant to be bound over in his own recognisances for two years. Defending counsel was, quite properly, not satisfied, and on his advice the appellant applied for leave to appeal against the original conviction. The matter being one of law, it has been treated by this Court as a final appeal.

From beginning to end of this case there has been what may be described as a "Comedy of Errors", and the law has been persistently and consistently disregarded. The Court has now to consider whether the conviction of receiving ought to stand, and, in the opinion of the Court, it is quite clear that it cannot stand. There is no crime in the calendar which requires a more careful direction to a jury than the crime of receiving, both with regard to the elements of the offence and the law relating to it. In this case not a word was said in the course of the trial on those matters, and on that ground the Court quashes the conviction. It follows that the sentence which was passed in respect of it by another Judge on a later occasion must also be quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

HORACE GEORGE ANDREWS.

1938.
12 *December.*

Habitual Criminal—Prisoner not Defended by Counsel—Prisoner not Informed of Right to Call Witnesses — Witness for Defence Present in Court—Conviction Quashed.

A prisoner who was charged with being a habitual criminal was not defended by counsel. He gave evidence on his own behalf, but was not informed by the Judge of his right to call witnesses. A witness subpœnaed for the defence was present in Court.

Held, the conviction must in the circumstances be quashed.

Held, further, it is desirable that a prisoner charged as a habitual criminal should be defended by counsel.

Appeal against conviction and sentence as a habitual criminal.

The appellant pleaded guilty before the Commissioner at the Central Criminal Court on October 13, 1938, to receiving stolen property, and was found by the jury to be a habitual criminal. He was sentenced to three years' penal servitude and five years' preventive detention.

The appellant was not defended by counsel. He gave evidence on his own behalf, but was not informed by the Judge of his right to call witnesses. A witness subpœnaed for the defence was present in Court and had been interviewed by the appellant on the day of his trial.

The appellant in person.

S. G. Howard, for the Crown:

The fact that the appellant was not informed of his right to call witnesses is certainly unfortunate, but the appellant is a man fully conversant with the procedure of criminal

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12 *December*.

HORACE GEORGE ANDREWS.

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Courts, and it is difficult to suppose that in the circumstances he was handicapped.

THE LORD CHIEF JUSTICE: This appellant was charged at the Central Criminal Court on an indictment which charged him in the first count with breaking and entering and stealing, and in the second count with receiving stolen property. There was also an averment that he was a habitual criminal. He pleaded guilty to the second count, and thereupon he was charged with being, and was found to be, a habitual criminal. He was afterwards sentenced to three years' penal servitude and five years' preventive detention, and appeals against his conviction and sentence as a habitual criminal.

[After referring to the facts relating to the substantive offence, His Lordship continued:] With regard to the charge that the appellant was at the material time a habitual criminal, the case was proved up to a certain point. It was proved that the appellant had been sent to prison on twenty previous occasions and had received various terms of penal servitude, and that at the time of committing the substantive offence on September 8, 1938, he was a convict on licence, having been released on September 2. It appears, however, that since his release he had made an application to a certain hotel for work.

The appellant gave evidence on his own behalf, but, unfortunately, by mere inadvertence, the Commissioner omitted to ask the appellant if he desired to call any witnesses. We are told that he did desire to call one witness at any rate. Whether the calling of that witness would have had the effect of preventing the jury from arriving at the conclusion at which they did arrive is difficult to say. We think it, however, extremely desirable not only that the utmost care should be taken to inform a prisoner of his right to call witnesses, but also that, where there is a charge of being a habitual criminal, unless the circumstances are

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very unusual, a prisoner should have the advantage of being represented by counsel.

In the present case not only was the appellant unrepresented by counsel, but there was an omission to inform him that he could, if he chose, call witnesses. In the circumstances it seems to us that his conviction and sentence as a habitual criminal ought not to stand, and they are, accordingly, quashed.

Conviction as habitual criminal quashed.

Solicitor for the Crown : Solicitor for Metropolitan Police.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

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JOSEPH BILLER.

Sentence—Borstal Detention—Committal by Petty Sessions to Quarter Sessions—One Discharge on Probation Before Conviction at Petty Sessions—Failure to Observe Condition of Recognisance—Commission of Subsequent Offence Sufficient Proof—Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 10 (1).

Under section 10 (1) of the Criminal Justice Administration Act, 1914, one of the conditions precedent to a magistrate committing a young offender to quarter sessions with a view to his being sentenced to detention in a Borstal institution is that it must be proved " that the offender has previously been convicted of any offence or, that having been previously discharged on probation, he failed to observe a condition of his recognisance ".

The appellant appeared before a police magistrate in July, 1938, charged with an offence of larceny, and, on being found guilty, was discharged and put on probation for two

years. In November, 1938, he was convicted by another police magistrate of obtaining money by means of a forged instrument and committed to quarter sessions for sentence.

Held, the magistrate was entitled to commit him for sentence to quarter sessions under the above sub-section, as proof of breach of recognisance was afforded by the mere fact that the appellant had, during the period of probation, committed the offence of which he was convicted in November, 1938.

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Appeal against sentence (on certificate).

The appellant had been discharged and placed on probation for two years at Old Street Police Court on July 1, 1938, after having been found guilty of larceny in a dwelling-house. On November 22, 1938, he was convicted at Thames Police Court of obtaining money from the Postmaster-General by means of a forged entry in a Post Office Savings Bank book, and the magistrate committed him for sentence to the County of London Sessions under section 10 (1) of the Criminal Justice Administration Act, 1914 (*a*).

On December 6, 1938, the appellant appeared before the

(*a*) By the Criminal Justice Administration Act, 1914, s. 10 (1): "Where a person is summarily convicted of any offence for which the Court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and—(a) it appears to the Court that the offender is not less than sixteen nor more than twenty-one years of age; and (b) it is proved that the offender has previously been convicted of any offence or, that having been previously discharged on probation, he failed to observe a condition of his recognisance and (c) it appears to the Court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court, in lieu of passing sentence, to commit the offender to prison until the next quarter sessions," and the Court of quarter sessions may then pass a sentence of detention in a Borstal institution for a period not exceeding three years.

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Deputy Chairman at the County of London Sessions. The conviction of November 22 and the previous binding over were there proved, and it was proved also that the appellant was a person of criminal habits or tendencies. The Deputy Chairman passed sentence of three years' detention in a Borstal institution, but gave a certificate, under section 3 (b) of the Criminal Appeal Act, 1907, that the case was fit for appeal on the ground that it was arguable (1) that the committing magistrate was not entitled to treat (as he did treat) the conviction before him as a failure to observe a condition of the recognisance sufficient to satisfy the requirements of the above sub-section; (2) that therefore he had no jurisdiction to make the committal; and (3) that the Court of quarter sessions had therefore no jurisdicton to pass the above sentence.

John Phipps, for the appellant:

In order to satisfy the requirements of section 10 (1) of the Criminal Justice Administration Act, 1914, it was not sufficient merely to prove that the appellant was on probation at the time of his conviction by the committing magistrate. The sub-section requires proof of some breach of recognisance other than the mere fact of a subsequent conviction.

S. H. Noakes, for the Crown, was not called on to argue.

HUMPHREYS, J.: This appellant appears before this Court by virtue of a certificate granted by the Deputy Chairman of the County of London Sessions, who says in his certificate that there is a question of law proper to be argued before this Court. This is not a case in which the appellant was convicted by the Court of quarter sessions. He had been convicted by the magistrate at Thames Police Court, but, by virtue of section 10 of the Criminal Justice Administration Act, 1914, he was committed to quarter

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sessions in order that quarter sessions might consider the question of the appropriate sentence.

It was proved before the magistrate that the appellant had committed the crime of obtaining £3 from the Postmaster-General by means of forged entries in a Post Office Savings Bank book, and the magistrate was further informed that the appellant had on July 1, 1938, been charged with the offence of larceny in a dwelling-house and had then been bound over for two years, one of the terms of the recognisance being that he should keep the peace and be of good behaviour during the term of the recognisance and should place himself under the orders of a probation officer. At quarter sessions the conviction at Thames Police Court was duly proved and it was also proved that the appellant had been bound over at Old Street Police Court on July 1, 1938. It was further proved that the appellant was a person of criminal habits or tendencies, and that matter is no longer in dispute.

It is sufficient to say that the case comes precisely within the language of section 10 (1) of the Criminal Justice Administration Act, 1914. The appellant was a young man of seventeen years of age, he had been summarily convicted of an offence of the class mentioned in the section, and it was proved before the magistrate, and subsequently also at quarter sessions, that he had previously been discharged on probation and had failed to observe a term of the recognisance into which he had then entered. That was proved by the fact that he had subsequently committed the offence of which he was convicted by the magistrate.

There are no grounds on which the Court can interfere with the sentence of detention in a Borstal institution, and the appeal must be dismissed.

Appeal dismissed.

Solicitor : Solicitor for Metropolitan Police, for the Crown.

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FLORENCE MILNE.
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JOHN CHARLES LEONARD.

Gaming and Wagering—Betting House—Bookmaker away from Premises—Use of Telephone Boxes on Premises for Communicating Bets—Arrangement with Owner or Keeper—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

The three appellants were convicted of conspiracy to keep a betting house and the appellant M. was further convicted of keeping, and the appellant B. of assisting in the keeping of, a betting house. M. was the manageress of, and B. assisted her in the management of, a club, nearly all the members of which were interested in betting and used telephone boxes inside the club for the purpose of making bets with a bookmaker who had an office 50 yards away. The bookmaker was also a tenant of premises above the club, and employed a member of the club as his clerk there. After receiving the results of the various races, the bookmaker would telephone them to his clerk, who paid the members their winnings or collected their losses from them.

Held, that it was sufficient to support the convictions that there should be some tacit arrangement between the bookmaker and the owner or keeper of the club, in pursuance of which members telephoned to the bookmaker, and that it was not necessary for the prosecution to prove that the bookmaker had been procured by the owner or keeper to carry on his betting with the members.

BELTON *v.* BUSBY, [1899] 2 Q. B. 380, followed and applied.

Held, further, that the appellants could not escape liability by reason of the fact that the bookmaker made his bets by means of regular telephonic communication with the premises instead of by actually entering them himself.

SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, approved and followed.

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Appeals against conviction.

The three appellants were convicted on October 29, 1938, at the Central Criminal Court before the Commissioner of conspiracy to keep a betting house. The appellant Milne was further convicted of keeping, and the appellant Boundford of assisting in the keeping of, a betting house. Milne was fined £50 and ordered to pay the costs of the prosecution up to an amount not exceeding £25; Boundford was fined £20; and Leonard £25.

Milne was the manageress of a social club called the Byculla Club, at 72 Bartholomew-close, and Boundford assisted her in the management. Nearly all the members of the club were interested in betting, and betted with a bookmaker named Payne, a member of the club, who had an office 50 yards away. Payne took a tenancy of the floor above the club premises and employed one Green, a member of the club, to act as his clerk there. There were two telephone boxes in the club, and members used these for the purpose of making their bets with Payne. Payne, after receiving the results of the various races, would telephone them to Green, and members used to go to the floor on which Green was employed to collect their winnings or pay their losses. Leonard was a member of the club.

A. T. Denning, K.C. (*H. C. Leon*, with him), for the appellants:

The Commissioner was wrong in directing the jury that, in order that the bookmaker should be a "person using" the premises for the purpose of betting with persons resorting thereto, it was sufficient that there should be an arrangement or understanding with the owner or keeper, in pursuance of which members telephoned to the bookmaker. The "person using" must be a person analogous to and of the same genus as the owner, occupier, manager, etc., and he must have some degree of control *de facto* or *de jure*. [He referred to POWELL *v.* KEMPTON PARK RACECOURSE CO.,

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[1899] A. C. 143.] [Humphreys, J., BELTON *v.* BUSBY, [1899] 2 Q. B. 380, was a case of an arrangement.] But there the bookmaker was present on the premises and had *de facto* control, which is not the case here. In order that the house in the present case should constitute a betting house, it should have been proved that the bookmaker was a "person procured" by the owner or keeper. That was the *ratio decidendi* of SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, which was similar to this case by reason of the fact that the bookmaker made his bets by means of the telephone and did not physically enter the premises, but was distinguishable in that the bookmaker paid a commission to the club on bets introduced by the club. Atkinson, J., held that the bookmaker was a "person procured", not that he was a "person using". Here there was no charge of procurement, and the Commissioner directed the jury that it was unnecessary to go so far as to prove procurement.

J. G. Trapnell, K.C., and *Edward Clarke*, for the Crown, were not called on to argue.

HUMPHREYS, J.: No point is raised as to the evidence in this case. It must be taken, as the Commissioner said, that there was ample evidence to justify a conviction in the case of each of the appellants. The question is whether the law was correctly stated by the Commissioner. [After referring to the evidence, his Lordship continued.] The Commissioner told the jury, first of all, that they must be satisfied that the premises were kept substantially for the purpose of betting. No complaint is made with regard to that direction. He then told them that they must be satisfied further that the premises were kept for the purpose of Payne using the club virtually as his betting office. It was not sufficient, he said, that the premises should have been used by Payne in the way in which every member used them; there must have been some special use by Payne, and he must have been in a position akin to that of owner or occupier. The allegation

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of the prosecution was that there was an arrangement between Mrs. Milne and Payne that Payne should have special facilities for betting with members, and the jury were told that it was a question of fact for them to decide whether he was using the club in a manner analogous to that of the owner or keeper and was, accordingly, a person using the premises for the purpose of betting with the members who resorted thereto.

The jury were directed perfectly properly on the lines of the decision in POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143. The effect of that decision was that, inasmuch as the bookmakers in the ring had no special place allotted to them and were not given any special facilities for betting by the proprietors of the course, it could not be said that they were using the ring in a character analogous to the character of a person who was the owner or occupier of the ring.

That decision was followed by BELTON *v.* BUSBY, [1899] 2 Q. B. 380. In that case it was sought to extend the doctrine to the case of a public-house. It was proved that a bookmaker had used a public-house repeatedly and regularly for the purpose of making bets with customers, but it was contended that, inasmuch as he had no place allotted to him, it could not therefore be said that he was using the premises in a manner analogous to user by the owner. The answer to that contention was given by GRANTHAM, J., in his judgment at p. 383: "There is, it seems to me, this great distinction between the racecourse cases, such as POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*), and the present, that in the former the bookmakers and the members of the public who bet with them go into the racecourse inclosures on exactly the same footing; the place is open to them both on the same terms; the one has no greater right to be there than the other. But that was not the case here. The bookmaker Woods had something in the nature of a right or licence to use the bar of the beer-

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house for the purposes of his betting business over and above the right of an ordinary member of the public to resort there. This seems clear from the findings of the magistrate." The magistrate had found that the proprietor of the beerhouse had given the bookmaker tacit permission to use the bar for the purpose of his business. The judgment continues: "The case finds that he was allowed to remain there regularly for certain hours every day, although he was not there as a customer of the beerhouse, and did not order any of the beer which was to be got there; whereas ordinary members of the public would not be allowed to remain there unless they purchased the beer." That case seems to show that a person who uses premises for the purpose of betting may himself commit an offence, and may also bring the owner or occupier into the category of offending persons, if he does so with the permission of or by arrangement with the owner or keeper of the premises. It appears to the Court that that case applies here. There was evidence on which the jury could find, having been rightly directed by the Commissioner on the law, that Payne was using the premises by arrangement with or permission of Mrs. Milne the keeper, and in those circumstances the jury were justified in finding that he was using them in a way prohibited by the Act.

It was contended that he could not be said to be using the premises in the way in which the premises were used in BELTON *v.* BUSBY (*supra*) because he did not go to them himself. In our opinion, in SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, Atkinson, J., rightly rejected the contention, which appears to have been scarcely urged by counsel in that case, that the bookmaker was not using the premises because he was only communicating with them by telephone. As Atkinson, J., pointed out in that case, and as this Court is clearly of opinion, a person who, by permission of the owner of club premises, uses the telephone for the purpose of continually telephoning bets to the members of the club, is acting in the same way as if he stood at the door

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and made bets with them. The oral arrangement for making the bet is made in exactly the same way as if the persons were face to face, and the mere fact that, instead of coming to the premises and making bets face to face, he regularly communicates by telephone with the club premises and so uses them for a substantial part of the making of each bet, makes no difference to the legal position.

The Court is of opinion that the law was correctly stated by the Commissioner, and these appeals must, accordingly, be dismissed.

Appeals dismissed.

Solicitors: Docker, Andrew & Co., for appellants; The City Solicitor, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1938.
28 *Nov.*
5 & 19 *Dec.*

LESLIE FINDLATER.

Offence under Companies Act—Hawking Shares—"Debenture"—Acknowledgment of Existing Debt—Undertaking to Pay Percentage of Profits with Guaranteed Minimum—Provision for Insurance—Companies Act, 1929 (19 & 20 *Geo.* 5 *c.* 23), *s.* 356 (1), (7), *s.* 380 (1).

A company engaged in mushroom growing obtained its capital by the sale of "units", to the holders of which it issued certificates. By such certificates the company undertook that it would pay the holder profits proportionate to 50 per cent. of the net profits arising from the sale of mushrooms, that the profits payable to the holder should be not less than 10 per cent. of the money subscribed by him and that a bond issued by an insurance company, in respect of which the company would pay the premiums, would be issued to the holder guaranteeing the return of his capital after twenty-one years. The units were sold by canvassers who went from house to house offering them for sale. The appellant, who was a director of the company, was convicted of conspiracy to contravene section 356 (1) of the Companies Act, 1929, and of causing and procuring certain persons to go from house to house offering shares for subscription or purchase to the public in contravention of that section.

Held, that by reason of the undertaking by the company to pay the insurance premiums, there was an acknowledgment of an existing debt so as to constitute the certificates "debentures" within the meaning of section 356 of the Companies Act, 1929, and that the appellant, by acquiescing in the sale of the units by canvassers, had committed the offences charged and was properly convicted.

Appeal against conviction.

The appellant was convicted before the Recorder at the Central Criminal Court on July 1, 1938, of conspiring

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between January, 1936, and March, 1938, with certain other persons to contravene section 356 (1) of the Companies Act, 1929, and also of causing and procuring certain persons to go from house to house offering shares for subscription or purchase to the public in contravention of that section, and was bound over in his own recognisances.

The appellant was a director of a company known as Cucklington Mushrooms, Ltd., which was registered in June, 1935, to take over a mushroom-growing business. The company was financed by the sale of " units " by canvassers, who went from house to house offering them for sale. The appellant, who became a director in November, 1936, took an active part in the company's business and arranged for a form of insurance of the capital subscribed by the unit holders. In January and February, 1938, a new form of " unit ", incorporating this insurance, was offered for sale by the canvassers to persons who had already purchased units in the company. These units, which formed the subject of the charge against the appellant, were called Founders' Units, and certificates which were issued to purchasers of units were called Founders' Unit Guarantee Certificates. The material parts of these certificates are set out in the judgment of the Court.

R. F. Levy, K.C. (*the Hon. Quintin Hogg* and *J. Grimond*, with him), for the appellant:

First, the certificates were not " shares " in law, but only evidence of a contract between the company and the subscriber. Nor were they " debentures " within the meaning of section 380 of the Companies Act, 1929. A document is not a " debenture " unless it acknowledges an existing debt: SINGER *v.* WILLIAMS, [1921] 1 A. C. 41. This case is distinguishable from LEMON *v.* AUSTIN FRIARS INVESTMENT TRUST, LTD., [1926] Ch. 1, since here there was no acknowledgment of present indebtedness.

Secondly, the appellant could not be guilty of a criminal

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conspiracy to do something which he did not know or believe to be unlawful or improper. Some degree of *mens rea* is necessary. There is no authority for the proposition that a mere agreement to do something unlawful without any knowledge of the wrongfulness constitutes a criminal conspiracy. The word "conspiracy" implies an intention to do something knowing that it is contrary to law: *per* Lord Dunedin in SORRELL *v.* SMITH, [1925] A. C. 700, at p. 725.

Thirdly, there was no evidence of a conspiracy in the present case.

Fourthly, there was no evidence that the appellant caused or procured salesmen to offer shares. The appellant merely signed documents as a director: he had no control over the salesmen, and the mere fact that he knew that they were selling units cannot be said to amount to procuring.

G. B. McClure, for the Crown:

The appellant admitted in cross-examination that he was a party to the selling of units in the company. The only matter to be considered is whether the units were "debentures". In order to decide this the question must be asked whether there was an acknowledgment of indebtedness. It is submitted that paragraph 4 of the Founders' Unit Guarantee Certificate, which is the document which is said to be a debenture, contains at least an implied acknowledgment of indebtedness in respect of insurance premiums. By that paragraph each subscriber of £15 is guaranteed his money back and a little more. In LEMON *v.* AUSTIN FRIARS INVESTMENT TRUST, LTD, [1926] Ch. 1, at p. 19, Sargant, L.J., says that you may have an existing debt which is only to be payable in the future and may be payable on a contingency. The documents in the present case should be looked at in the same way as the document in that case. The provision for transfer in paragraph 5 of the certificate indicates that there is an indebtedness to transfer. There is also an acknowledgment by the company that they will pay the premiums to the insurance company.

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R. F. Levy, K.C., in reply:

The acknowledgment of indebtedness must be an acknowledgment of indebtedness in a fixed sum. Here there was only a promise to pay a share of future profits with a guarantee of a minimum payment, and the company did not acknowledge that it was indebted in any particular sum. This document was no more a debenture than a preference share. It was simply a contract to pay for twenty-one years a proportion of the profits and to insure such payment: it never said that the company would repay the £15 subscribed.

THE LORD CHIEF JUSTICE: We are much indebted to counsel on both sides for their assistance. The Court is agreed that the appeal must be dismissed, and will state its reasons in a few days.

Cur. adv. vult.

December 19.—The following considered judgment of the Court was read by:

CHARLES, J.: The appellant was convicted at the Central Criminal Court before the Recorder of conspiring between January, 1936, and March, 1938, with six men named Murchie, Naiman, Soskin, Wilson, Mendoza and Naar, and with other persons unknown, to contravene section 356 (1) of the Companies Act, 1929, and also of causing and procuring certain men named Naiman, Soskin and Wilson, in January and February, 1938, to go from house to house offering shares for subscription or purchase to the public in contravention of the same section. He was bound over in his own recognisances.

The history of the company and the appellant's connection with it may be shortly stated. In June, 1935, Cucklington Mushrooms, Ltd. (referred to as the company), was registered to take over the mushroom-growing business of a man named South. In September, 1936, its capital was

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increased from £3,000 to £7,000, and in October the appellant met an acquaintance, Murchie, who told him about the company, explained its system of finance, and told the appellant that its financial agents were Mendoza and Naar, who were directors of a concern called Oliver Berkeley, Ltd. It is to be observed that Oliver Berkeley, Ltd., had no other business than the raising of finance for the company, and took at first 50 per cent. and then, owing to the appellant's intervention, 40 per cent., of the capital raised for its services.

In November, on Murchie's suggestion, the appellant became a whole-time director at £750 a year and £200 allowance for expenses. When he so became a director he found that the company was being financed by the sale of "units" by canvassers sent out by Mendoza and Naar, who went from house to house endeavouring to sell "units" in the company. The appellant undoubtedly took an active part in the business and arranged for a form of insurance of the capital subscribed by the unit holders, and signed letters forwarding certificates sold by the canvassers to the purchasers of units.

In January and February, 1938, the three canvassers called on persons who had already subscribed for "units" and offered other "units" for sale, and these were made the subject of the present charges. They were called founders' units, and the certificate was called a founders' unit guarantee certificate. By these certificates the company undertakes: (1) That for a period of twenty-one years it will plant mushroom beds and cultivate the same at the company's farms, and that it will duly market the same at the best prevailing prices; (2) that for a period of twenty-one years it will pay to the certificate-holder profits proportionate to 50 per cent. of the net profits arising from the total sales of mushrooms marketed by the company, the said proportion to be based on the number of units issued by the company; (3) that the proportion of the annual profits pay-

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able to the holder of this certificate shall not be less than 10 per cent. per annum of the total amount of money subscribed by the holder of this certificate; (4) the company will arrange for delivery to this certificate-holder of a capital sinking fund bond, to be issued by the Crown Life Insurance Co., Ltd., or any other reputable insurance company, which bond shall guarantee to the holder the return of the subscribed capital under this certificate, intact, at the expiration of twenty-one years; (5) the holder of this certificate shall have the right to transfer this unit by giving thirty days' notice to the company.

Such being the nature of the founders' unit guarantee certificates, which were admitted to have been offered for sale from house to house, it is necessary to look at section 356 (1) and (7) and section 380 (1) of the Companies Act, 1929, to see whether the document can be properly described as a " share ", the selling of which from house to house constitutes an offence against section 356 (1). Sub-section 7 of this section states that the expression " shares " includes debentures, and in section 380 (1) " debenture " is defined as including debenture, stock, bonds, or any other securities of a company whether constituting a charge on the assets of the company or not.

The appellant appeals against his conviction on three grounds. The first ground of appeal is that the founders' unit guarantee certificate is not a " share " and this contention was generally accepted. There then arose the question whether or not such a document was a " debenture " so as to bring it within section 356 (1). This very question was considered by Goddard, J., on April 29, 1938, in NAIMAN, SOSKIN AND WILSON (unreported), and he came to the conclusion that the document which we are now considering *was* a debenture. We agree with the opinion which he expressed in that case.

This Court has had the advantage of perusing three documents which we believe were not before Goddard, J.

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First, in a document called "The Great Three-Point Programme for 1938", the third point is expressed as follows: "Unit holders to receive larger profits and assured security of capital." And in the same document this further statement is to be found: "It should be clearly realised that the capital refunding bonds issued in respect of founders' units involve unit holders in no liability of any kind. All premiums are paid by the company. The bonds may be assigned to any nominee of unit holders and are transferable at any time during the twenty-one years." Secondly, a document entitled "Application for sinking fund bond", which is expressed as maturing in twenty-one years, has printed on it in red lettering, distinctive from the rest of the document, the following words: "It is understood and agreed that the sinking fund bond shall be purchased on my behalf and in my name by Cucklington Mushrooms, Limited, who shall defray the entire cost thereof; the bond to be delivered to me and to be my sole property." Thirdly, the policy itself undertakes to pay the sum assured at the maturity date—that is, at the twenty-first anniversary of the date hereof.

It is quite clear that there never has been any precise definition of a debenture. In BRITISH INDIA STEAM NAVIGATION CO. *v.* INLAND REVENUE COMMISSIONERS (1881), 7 Q. B. D. 165, at p. 172, Lindley, J., said: "Now, what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness." The founders' unit guarantee certificate does appear to contain that which is implicit in the widest definition of a debenture—namely, an acknowledgment of an

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existing debt. The company undertakes to pay the premiums to a reputable insurance company which undertakes to return the amount of the subscribed capital intact at the end of twenty-one years. Such premiums are to be paid annually out of the company's own funds and, failing the payment of such premiums, the terms of the policy of guarantee would become inoperative, unless the company revived the policy, which by its failure to pay would cease to be in force, by a payment of unpaid premiums within two years. By undertaking to pay these premiums the company takes on itself a liability which is only consistent with an acknowledgment of an existing debt.

It was urged on behalf of the appellant that there was no acknowledgment of an existing debt because, even if there was a debt or obligation to pay, it was not an immediate debt but referred to something payable in the future. But reference to the judgment of Sargant, L.J., in LEMON *v.* AUSTIN FRIARS INVESTMENT TRUST, LTD., [1926] Ch. 1, at p. 19, makes it clear that such an argument cannot be sustained. As the learned Lord Justice said: "But surely that is altogether to give the go-by to the common doctrine that you may have a debt which is *debitum in præsenti solvendum in futuro*, and which may not only be payable in the future but may be payable on a contingency."

Regarding, therefore, the founders' unit guarantee certificate as a debenture, we hold that the offence alleged under section 356 (1) is complete if any person goes from house to house offering such debenture for subscription or purchase to the public or any member of the public.

The appellant has clearly conspired with the canvassers to contravene section 356 (1) of the Companies Act, 1929. We say "clearly conspired" because, by his own admission, he was well aware that such a course was being adopted by the canvassers. It was contended on his behalf that, although he was aware of the existing system which had been adopted, and acquiesced therein, he would not have

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done so had he known that such a system was unlawful. This submission appears to us to cut athwart the first principles of law. Ignorance of the law will not excuse from the consequence of guilt any person who has the capacity to understand the law (1 Hale 42). When he conspired to do the unlawful act, the offence was complete, whether he had knowledge of its illegality or not.

It was finally argued that, inasmuch as he had never met the canvassers, it could not be justly said that he had caused or procured them to commit the act which was in fact illegal. The system was in operation before he joined the company, it is true, but he acquiesced in that system, corrected the " literature " for the canvassers, and was also well aware that the company, for a directorship in which he was being paid £750 a year, was being financed by the sale of those units.

For these reasons the Court considers that the appeal should be dismissed.

Appeal dismissed.

Solicitors—Herbert Baron & Co., for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE SINGLETON.

GEORGE BASNETT JONES.

1939.
16 *January.*

Evidence—Corroboration—Carnal Knowledge of Girl—Girl and Prisoner both found to be Suffering from Venereal Disease.

On a charge of carnal knowledge of a girl aged nine, evidence was given that the girl, who was known to the prisoner and had been to his house on more than one occasion, was medically examined soon after the date of the alleged offence and was found to be suffering from a venereal disease, and that the prisoner was at that time suffering from the same disease.

Held, that this was a matter which the jury were entitled to regard as corroboration of the girl's evidence.

Appeal against conviction.

The appellant was convicted on November 21, 1938, at Nottinghamshire Assizes of carnal knowledge of a girl aged nine and was sentenced by Oliver, J., to four years' penal servitude.

Evidence was given at the trial that the girl, who was known to the appellant and had been on more than one occasion to his house, was found when medically examined soon after the date of the alleged offence to be suffering from gonorrhœa, and that the prisoner was also found to be suffering from that disease at that time. The Judge ruled that the jury were entitled to regard this evidence as corroboration of the girl's evidence.

Nigel Robinson, for the appellant:

The fact that the appellant and the girl were both suffering from the same disease was not a matter which could properly be regarded as corroboration of the girl's evidence. The evidence did not tend to implicate the

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appellant, but a class of persons. In all the decided cases evidence which has been regarded as affording corroboration has related to something individual to the person charged. Apart from the matter relied upon, there was no corroboration of the girl's evidence.

Norman Winning and *Geoffrey Smallwood*, for the Crown, were not called on to argue.

CHARLES, J.: The appellant was convicted at Nottinghamshire Assizes of having unlawful carnal knowledge of a girl aged nine and was sentenced to four years' penal servitude. He now appeals against conviction.

The only ground of appeal urged before us by Mr. Robinson is that there was no corroboration of the little girl's evidence. The little girl was well known to the appellant and had been to his house on more than one occasion. She gave evidence that she had been indecently assaulted by him and that ultimately he had connection with her on more than one occasion. Very soon afterwards this unfortunate little girl was found to be suffering from gonorrhœa. The appellant also was examined, and it was found that he too was suffering from gonorrhœa. That matter was treated, and in our opinion rightly treated, by the Judge as being corroborative of the child's evidence. If the jury were entitled so to regard the fact that the appellant, knowing the child as he did, was found to be suffering from gonorrhœa and that the child who alleged that an attack had been made by him on her body was also suffering from gonorrhœa, then the conviction of the appellant was almost inevitable. The jury, considering the case in the light of that evidence and being properly directed by the Judge as to its importance and implications, found the appellant guilty.

The Court is of opinion that this appeal must be dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE SINGLETON.

THOMAS JOSEPH TREANOR.

1939.
16 *January.*

Bigamy—Seven Years' Absence—Defence Available to "Person Marrying a Second Time"—Whether Available in Case of Bigamous Marriage Later in Point of Time—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

Section 57 of the Offences against the Person Act, 1861, which constitutes and defines the offence of bigamy, contains the following proviso: "Provided that nothing in this section contained shall extend . . . to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time . . ."

The expression "a second time" in the above proviso is to be strictly construed. The defence given by the proviso is, therefore, not available in the case of a bigamous marriage later in point of time than the second ceremony of marriage in which the prisoner has taken part.

Appeal against conviction.

The appellant was indicted at Sussex Assizes on December 7, 1938, before Atkinson, J., on an indictment containing four counts. The first count charged him with bigamy with Lilian May Anderson on July 12, 1930; the second with bigamy with Kathleen Florence Collins Davis on January 26, 1938; and the third and fourth counts with making false statements for the purpose of entries in marriage registers with regard to the above respective ceremonies. He was also charged in another indictment with larceny. He pleaded Not Guilty to the first two counts of the first indictment, and Guilty to the last two counts, and also Guilty to the second indictment. On the first count the prosecution offered no evidence, and after a

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point of law submitted on the appellant's behalf had been ruled against him by the Judge, the appellant pleaded Guilty to the second count also. He was sentenced to twelve months' imprisonment on the charge of bigamy, and, concurrently with that sentence, to consecutive terms of imprisonment amounting to nine months on the charges with regard to making false statements; and to a further term of six months' imprisonment on the charge of larceny.

The appellant had married his lawful wife in July 1916, and had deserted her in 1918. The prosecution were unable to prove that he had known her to be alive at any time since that date, and for that reason offered no evidence on the first count.

Geoffrey Lawrence, for the appellant:

The point taken by the prosecution in the Court below was that the expression "marrying a second time" in the proviso must be very strictly construed, and that the reference is only to a marriage which is second in arithmetical order. It is submitted, however, that in the main part of the section the bigamous marriage envisaged by the draftsman is referred to as a "second marriage" and that the intention of the statute was to give a defence to a man who has been absent from his legal wife for seven years if he is subsequently charged with any bigamous marriage, and that it is immaterial whether such marriage is second, third or fourth in numerical order; otherwise the defence would not be available to a man who had been twice lawfully married.

Eric Neve, for the Crown:

The phraseology of the proviso must be regarded as deliberate. Marrying "a second time" means "a second time", not "a second or subsequent time".

THE LORD CHIEF JUSTICE [after stating the facts]: It was argued on the appellant's behalf that, inasmuch as the

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prosecution could not prove that at any time within the seven years next preceding either of the alleged bigamous ceremonies the appellant knew that his lawful wife was alive, he was entitled to be acquitted by reason of the proviso to section 57 of the Offences against the Person Act, 1861. It was contended that the defence contemplated by the proviso applied to the form of marriage into which the appellant entered in 1938 as much as to that into which he entered in 1930. It was argued by the prosecution that, as the words in the proviso are " marrying a second time " and not " a second or subsequent time ", the defence was available once only. The prosecution suggested that there was an analogy in the proviso to section 2 of the Criminal Law Amendment Act, 1922.

The question for the Court is whether the construction of the proviso contended for on the part of the appellant is right. We are of opinion that it is mistaken, and that the true view is that advanced below, and reiterated in this Court, by the prosecution. In our view the proviso means precisely what it says—neither more nor less—and when the expression " marrying a second time " is used it means " a second time " and is not to be artificially expanded into meaning " a second or subsequent time ". If it had been the intention of the Legislature to extend the effect of the proviso not merely to any second marriage strictly so called, but to any second or subsequent marriage, nothing could have been easier than to say so. This proviso, in our view, means not one word more than it says, and we are not in the least provoked by the suggested circumstances which counsel for the appellant foreshadows as arising in some unlikely state of affairs.

For these reasons we are of opinion that this appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE ATKINSON AND MR. JUSTICE SINGLETON.

1939.
23 *January.*

BENJAMIN HAMILTON.

False Pretences—Defence of Mistake—Cross-Examination as to Different Type of Fraud—Admissibility—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), s. 1 (*f*).

The appellant was charged with obtaining goods by false pretences, the allegation of the prosecution being that he had given cheques which he knew to be worthless in respect of the goods. He put forward the defence that he had a mistaken belief that the cheques would or might be met, and he was cross-examined with regard to another alleged fraud consisting in the obtaining of an overdraft from a bank by means of certain false representations.

Held, that the offence to which the cross-examination related was not an offence similar to those wherewith the appellant was charged, and that the cross-examination was accordingly irregular, but that in the circumstances of the case the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied and the appeal dismissed, as no substantial miscarriage of justice had occurred.

Appeal against conviction.

The appellant was convicted on November 21, 1938, at Essex Quarter Sessions of obtaining goods by false pretences and was sentenced by the Chairman to three years' penal servitude, twenty-six outstanding offences being taken into consideration.

The case for the prosecution was that the appellant had on three occasions obtained goods by means of cheques which he knew to be worthless. The following passage occurred in the cross-examination of the appellant.

Q. Is the police officer wrong when he said your reply

to his charge was: "All right, I admit doing a bit of fiddling. I did it for the wife's sake"?

A. Those actual words, yes.

Q. That is wrong?

A. Those actual words, yes.

Q. What did you say?

A. What I actually said to him was: "Well, for one thing I have got to bring in a word for private reasons. At the moment I shall want bail. After I get that, then I will play ball with you."

Q. Do you mind repeating that?

A. Yes. I said: "At the moment, for private reasons, I shall want bail. If I get that, I will play ball with you."

Q. Will you explain what that means?

A. Yes. Since you want it, you shall have it. I was wanted on a warrant from last March, and that police officer knew that. Because of that, I am here now.

Q. The warrant in relation to last March was in connection with a sum of £200 which you had obtained from Mr. R. J. Cooley of New Malden, Surrey, by fraud?

A. That is what the prosecution says, yes.

Q. And it is what you admit?

A. I do not admit anything yet.

The offence to which the warrant related was that of obtaining an overdraft from a bank by means of certain false representations.

J. C. Llewellyn, for the appellant:

The question with regard to the warrant should not have been put. It was a question tending to show that the appellant had committed an offence other than the offence wherewith he was charged, and an offence of a different kind, and accordingly contrary to the provisions of section 1 (f) of the Criminal Evidence Act, 1898. Further, there was misdirection in the summing-up.

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Percy Lamb, for the Crown:

The defence being that of mistake, the cross-examination objected to was admissible as showing an intent to defraud. [SINGLETON, J.: The warrant charged a different class of fraud.] It is submitted that the frauds were of a similar nature. No application was made by counsel for the appellant that the jury should be discharged and the trial re-commenced.

SINGLETON, J.: The appellant was charged at the Essex Quarter Sessions with obtaining goods by false pretences, the false pretences alleged being in relation to cheques passed by him in return for goods obtained. It was said that the goods were obtained by false pretences because at the time when the cheques were given there was no money in the appellant's bank to meet them and the appellant must have known that fact. After his conviction, the appellant admitted twenty-six other cases of fraud, and asked that they should be taken into consideration. He was sentenced to three years' penal servitude.

Mr. Llewellyn, on the appellant's behalf, has urged two grounds of appeal. In the first place he complains of the summing-up. [His Lordship then referred to certain passages in the summing-up and said that, in the opinion of the Court, there was no cause for complaint on that ground, and continued:] The main ground of complaint was directed to a question asked by counsel for the prosecution in the course of the appellant's cross-examination. Before Mr. Lamb commenced to cross-examine the appellant, he referred the Chairman to *Archbold's Criminal Pleading, etc.* (30th ed.), p. 366, where it is stated: "Where the gist of the alleged offence is fraud, intent is material, and evidence of other similar offences is admissible to prove the intent." The appellant's defence was that he thought there was or might be money in his account to meet the cheques and that at the most he had made a mistake. It was not

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disputed by counsel for the defence that it was open to counsel for the prosecution to cross-examine the appellant on other offences of a similar nature. While that may be done in a proper case, regard must be had, as has been pointed out in this Court time and again, to the strict terms of section 1 (f) of the Criminal Evidence Act, 1898, which do not permit that kind of cross-examination "unless—(i) the proof that [the prisoner] has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged". Exceptions (ii) and (iii) do not arise in this case.

Objection was taken to the question: "The warrant in relation to last March was in connection with a sum of £200 which you had obtained from Mr. R. J. Cooley of New Malden, Surrey, by fraud?" In our view, that was a question which ought not to have been asked. It was asked, in one sense, accidentally, because the appellant himself had drawn attention to the fact that there was a warrant out for him, and Mr. Lamb then proceeded to ask a question which we think he would not have asked unless he had been taken by surprise. The question related to a matter of the obtaining by the appellant of an overdraft from a bank by means of certain false representations. In our view, that was not an offence similar to the offences with which the appellant was charged, and the question could not properly be asked to rebut the defence put forward by the appellant in the circumstances of this case. If it could be said that a similar offence meant, as Mr. Lamb argued that it meant, any offence in connection with the appellant's motor car business, there would be little use left in the protection given by section 1 (f) of the Criminal Evidence Act, 1898.

When, however, this case is regarded as a whole, we feel that the above question and the answer to it can have had little effect on the result; indeed we think that it had none. Twenty-six charges of a like nature to the offences

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of which the appellant was found guilty were taken into consideration at his request, and on many of these he had been cross-examined and given his explanations, which the jury could accept or not, as they chose. In all the circumstances of the case we think it right to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and to dismiss the appeal, notwithstanding that one point raised by the appellant might be decided in his favour, because in our view no substantial miscarriage of justice has actually occurred.

Appeal dismissed.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE ATKINSON AND MR. JUSTICE SINGLETON.

1939.
23 *January.*

ALFRED MICHAEL JOHN TAYLOR.

Sentence—Increase—Offence of Violence.

Increase of sentence for an offence of violence.

Appeal against sentence.

The appellant pleaded guilty at the Central Criminal Court on December 6, 1938, to wounding John Walter Bromhead, a relieving officer of the London County Council, with intent to do him grievous bodily harm, and was sentenced by the Common Serjeant to eighteen months' imprisonment.

R. E. Seaton, for the appellant:

It cannot be contended that the sentence was excessive.

No counsel appeared for the Crown.

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ALFRED MICHAEL JOHN TAYLOR.

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CHARLES, J.: The appellant went to the office of the London County Council, and asked the relieving officer for money. He appears to have been under the misapprehension that he had been promised 10s., and when that was refused, he used threatening language and struck the relieving officer in the face with a razor blade, causing a very severe wound which stretched right down the side of his face. When questioned with regard to the offence, the appellant said: "I up with the blade and struck him with the intent to kill him. He is a lucky man to be alive"; and when he was charged he said: "I wish it had killed him."

In giving the appellant leave to appeal against his sentence, this Court specifically warned the appellant that it was within the power of the Court to increase as well as to diminish the sentence. A transcript of the shorthand note of our observations when giving leave to appeal was handed to the appellant and to counsel assigned to appear on his behalf.

The Court regards this offence as an extremely grave one. We consider the sentence passed to be quite inadequate, and we substitute for it a sentence of three years' penal servitude.

Sentence increased.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE ATKINSON AND MR. JUSTICE SINGLETON.

1939.
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REGINALD PERCY RICHARD CLIFFORD.

Sentence — Borstal Detention — Age Limit — Twenty-third Birthday—Prevention of Crime Act, 1908 (8 *Edw. 7, c.* 59), *s.* 1 (1)—*Borstal Detention (Extension of Age) Order*, 1936 (*S. R. & O.*, 1936, *No.* 839).

A sentence of detention in a Borstal institution may not be imposed on a young offender who has attained his twenty-third birthday.

SCOFFIN, 22 Cr. App. R. 27; [1930] 1 K. B. 741, followed and applied.

Appeal against sentence.

The appellant pleaded guilty at the Central Criminal Court on December 7, 1938, to an indictment which charged him with officebreaking and larceny and with possessing implements of housebreaking by night, and also to another indictment which charged him with uttering forged cheques and obtaining goods by means of forged cheques. He was sentenced by the Commissioner to three years' detention in a Borstal institution (*a*).

The appellant was born on December 7, 1915, and the day on which sentence was passed on him was his twenty-third birthday.

Derek O'Malley, for the appellant:

SCOFFIN, 22 Cr. App. R. 27; [1930] 1 K. B. 741, is an

(*a*) By the Prevention of Crime Act, 1908, s. 1 (1), as amended by the Borstal Detention (Extension of Age) Order, 1936, one of the conditions precedent to a young offender who has been convicted on indictment being sentenced to detention in a Borstal institution is that the offender shall be "not less than sixteen nor more than twenty-three years of age".

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authority for the proposition that the appellant, having attained his twenty-third birthday, was not eligible for Borstal.

[CHARLES, J., referred to CHAPMAN, 23 Cr. App. R. 63; [1931] 2 K. B. 606, a decision on the interpretation of section 2 of the Criminal Law Amendment Act, 1922, where the relevant words are, "a man of twenty-three years of age or under".]

[ATKINSON, J.: Here the relevant words are different. They are, "is not . . . more than twenty-three years of age".]

No counsel appeared for the Crown.

CHARLES, J.: This appellant pleaded guilty to an indictment which charged him with two offences of officebreaking and larceny and with being found by night in possession of implements of housebreaking, and also to another indictment in which he was charged with uttering cheques and obtaining tyres by means of forged cheques. On December 7, 1938, he was sentenced to a term of three years' detention in a Borstal institution. He now appeals against that sentence.

The ground of appeal is that at the time when the sentence was passed the appellant had just passed the actual age of twenty-three years and was therefore not eligible for Borstal. Mr. O'Malley has called our attention to the decision of this Court in SCOFFIN, 22 Cr. App. R. 27; [1930] 1 K. B. 741. That case was really on all fours with the present case. In that case it was decided that the appellant, being a day or two over the age of twenty-one years at the time when the sentence was passed, was not eligible for Borstal. The age limit has now been extended to twenty-three, and this appellant had reached his twenty-third birthday. The two cases being precisely on the same footing, we are bound by the decision in SCOFFIN, *supra*,

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and must vary the sentence passed. We are of opinion that justice will be done if we substitute for that sentence a sentence of nine months' imprisonment.

Sentence varied.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE ATKINSON AND MR. JUSTICE SINGLETON.

1939.
30 *January.*

JOHN JOSEPH HEMMINGS.

Incest—Father and Alleged Daughter—Girl's Mother Married to Person Other than Prisoner at Time of Conception and Birth of Girl—Presumption of Legitimacy—Rebuttal—No Evidence of Absence of Intercourse—Admissions by Prisoner that Girl was his Daughter—No Case to go to Jury.

The presumption of law that the child of a married woman was begotten by her husband and the rule that such presumption can be rebutted only by extraneous evidence of absence of intercourse apply to a charge of incest.

The prisoner was convicted of incest with a girl alleged to be his daughter. It was proved that the girl's mother, who at the time of the trial was married to the prisoner, was at the time of the conception and birth of the girl married to another man. No evidence of absence of intercourse between husband and wife was given, and, to rebut the presumption of legitimacy, the prosecution relied solely on certain admissions by the prisoner that the girl was his daughter.

Held, the above admissions could not rebut the presumption of legitimacy, which must prevail in the absence of extraneous evidence of absence of intercourse between husband and wife at the material time. The case should, therefore, have been withdrawn from the jury at the close of the case for the prosecution, and the conviction must be quashed.

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JOHN JOSEPH HEMMINGS.

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Appeal against conviction and sentence.

The appellant was convicted at Manchester Assizes on December 9, 1938, of incest with Gladys May Eveline Manley, who was alleged to be his daughter, and was sentenced by Croom-Johnson, J., to five years' penal servitude.

It was proved that the girl Gladys May Eveline Manley, who was aged nineteen, was born on July 8, 1919. Her mother was at that time married to George Henry Manley, and the entry of the birth of the child in the register of births for the registration district of Fulham was made by the mother, the name of the father being given as George Henry Manley. Subsequently George Henry Manley died, and in July, 1934, the appellant married Mrs. Manley.

At the trial counsel for the prosecution proposed to ask the mother of the girl whether the girl was in fact the daughter of George Henry Manley, but objection was taken by counsel for the defence on the ground that any such question would offend against the rule laid down in RUSSELL *v.* RUSSELL, [1924] A. C. 687, that there is a presumption that the child of a married woman was begotten by her husband. Croom-Johnson, J., upheld the objection and decided that the above rule applied to a charge of incest, but that the presumption was one which could be rebutted by extraneous evidence, including the evidence of the paramour. The prosecution gave no evidence of absence of intercourse between Mr. and Mrs. Manley at the material time, and relied solely on certain admissions made to the police by the appellant to the effect that the girl was his daughter as sufficient to rebut the presumption of legitimacy. Croom-Johnson, J., directed the jury that the question for them to determine was whether, having regard to the above admissions, the presumption of law that George Henry Manley was the father of the girl was displaced to their reasonable satisfaction.

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P. H. M. Oppenheimer (*R. N. Bibby-Trevor* with him), for the appellant:

The Judge correctly held that the presumption of legitimacy and the rule laid down in RUSSELL *v.* RUSSELL, *supra*, applied to this case. No independent evidence of absence of intercourse was given, and the Judge should therefore have withdrawn the case from the jury. [He was stopped.]

T. A. Cunliffe, for the Crown:

It is true that according to the rule in RUSSELL *v.* RUSSELL, *supra*, neither of the parties to the marriage could give evidence tending to bastardise the child, but a paramour may give such evidence. In the present case the appellant had made a number of statements in which he spoke of the girl as his daughter.

[SINGLETON, J.: In *Halsbury, Laws of England* (2nd ed.), Vol. II, p. 560, para. 768, it is stated that "it must be affirmatively proved, before the child can be bastardised, that the husband did not have sexual intercourse with his wife at the time when it was conceived".]

[CHARLES, J.: Until evidence of non-access was given, the prosecution had not set the case on its feet at all.]

ATKINSON, J.: This is an appeal against conviction and sentence of five years' penal servitude passed on the appellant for alleged incest with his daughter, a girl of nineteen. The appellant appeals on the ground that there was no evidence to go to the jury.

The girl was born in July, 1919, and the mother's name at that time was Manley. Beyond question, the mother was married to a man named Manley and the child was registered as the daughter of the mother's husband Manley. Later Manley died, and in 1934 the appellant married Mrs. Manley. The only evidence of paternity adduced for the prosecution was that the appellant had on several occasions spoken of the girl as his daughter, but the prosecution had

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to prove that the girl was in fact the daughter of the appellant.

The Court is of opinion that the law applicable to this matter is correctly stated in *Halsbury's Laws of England* (2nd ed.), Vol. II, p. 560, para. 768: "The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men." There was not a particle of evidence that Mrs. Manley had committed adultery with the appellant. The statement continues: "The law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved, before the child can be bastardised, that the husband did not have sexual intercourse with his wife at the time when it was conceived." As Charles, J., has pointed out, it would not have been enough to give evidence that the appellant had had intercourse with the mother at the time when conception might have been possible; it was necessary to give evidence that the husband did not have intercourse with his wife at the time when the child was conceived. There was no such evidence, and the only evidence on this matter was a series of statements by the appellant speaking of the girl as his daughter.

We are of opinion that the case should have been stopped at the close of the case for the prosecution and that the Judge ought to have told the jury that there was no case for them to consider. The appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE SINGLETON AND MR. JUSTICE LEWIS.

1939.
20 *February.*

TREFOR DAVID.

Sentence—Breach of Recognisance—Procedure to be Followed —Issue not Triable by Jury.

Where a prisoner has been convicted and released on entering into a recognisance to be of good behaviour and to come up for judgment if called upon, and he is subsequently called upon to come up for judgment, and the Judge decides that there has been a breach of recognisance and passes sentence, the appeal which lies to the Court of Criminal Appeal in respect of those proceedings is an appeal against sentence. The Court will, however, investigate the question whether the breach has been properly proved and whether the appellant has had an opportunity of making his answer to the allegation that he has committed a breach of the recognisance.

SMITH, 18 Cr. App. R. 170; [1925] 1 K. B. 603, followed.

There is no ground whatever for suggesting that the issue whether there has been a breach of recognisance is triable by a jury, and it is not accurate to refer to a decision that there has been a breach of recognisance as a "conviction". The headnote and statement of facts in PINE (1932), 24 Cr. App. R. 10 should be modified to this extent.

Appeal against sentence.

The appellant was convicted before Greaves-Lord, J., at Glamorganshire Assizes held at Cardiff on March 9, 1938, of publishing defamatory libels on persons in authority at the Glamorgan Mental Homes. He was released on entering into a recognisance to come for judgment if called upon at any time within two years and during that period to be of good behaviour and not to repeat any of the allegations contained in the libels. The recognisance followed the usual

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form, and contained the words " the condition of this recognisance being that ", etc. Subsequently he received notice to come up for judgment, the allegation being that he had committed breaches of the above recognisance by making statements at a public meeting on August 21, 1938, and elsewhere. On December 5, 1938, the issue whether the appellant had broken his recognisance was tried by Greaves-Lord, J., at the Glamorganshire Assizes held at Swansea. The Judge heard a number of witnesses for the prosecution and defence, and was addressed by counsel for the defence. He decided that the breach of recognisance had been established, and passed sentence of twelve months' imprisonment with hard labour.

F. H. Lawton, for the appellant:

The issue whether the appellant had broken his recognisance should have been tried by a jury. At common law such an issue was dealt with by a jury as an issue of fact, and no statute has taken away a defendant's right to a jury in this matter. [He referred to HEYWARD (1639), Cro. Car. 499, and Crown Office Rules, rules 112—115 (inclusive) and rule 166.]

Ralph Sutton, K.C., and *Geraint Rees*, for the Crown, were not called on to argue.

HUMPHREYS, J.: This appellant appeared before this Court on January 30, and then applied for leave to appeal. The ground of his application appeared to be a ground of law, and, that being so, the Court, without going into the merits, intimated that the case should be transferred from the list of applications to the list of final appeals.

The appeal which we have heard to-day is quite clearly an appeal against sentence. The appellant has been convicted once only, in March, 1938. There was no appeal against that conviction, and the time for appealing has long gone by. He was, however, on December 5, 1938, sentenced

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to a term of twelve months' imprisonment with hard labour, and from that sentence there is in the terms of the Criminal Appeal Act, 1907, a right of application for leave to appeal and, in the circumstances of this case, a right of appeal.

The appellant was convicted at Glamorganshire Assizes in March, 1938, before Greaves-Lord, J., of libels on the doctors, attendants, officers, councillors, and clergymen in authority at the Glamorgan Mental Homes. The libels were published in the form of a leaflet charging them with permitting the most dreadful things to happen, including the use of physical violence on mental patients. The appellant filed a plea of justification, and that issue was tried. The jury, after a few moments' deliberation, found that the justification was not proved and convicted the appellant. The Judge took the merciful course of giving the appellant an opportunity of behaving himself in future and did not then send him to prison. He intimated that any repetition of the libels would assuredly result in a sentence of imprisonment, but he did not at the time pass any final judgment on the conviction recorded against the appellant. He allowed the appellant to go free, but before doing so required him to enter into a recognisance to come up for judgment if called upon at any time within two years. In such a recognisance it is usual to find the words " and to be of good behaviour during that time ". In this particular case it was pointed out to the Judge by counsel for the prosecution that the appellant ought to be put on special terms not to make any similar attack on the persons in authority at the mental homes in future, and accordingly there was embodied in the recognisance the terms of an undertaking in writing " not to repeat in any manner whatsoever the allegations contained in the criminal libels upon the doctors, attendants, officers, councillors or ministers of the Gospel in authority in the Glamorgan Mental Homes ".

On December 5, 1938, the appellant was brought up at Swansea Assizes before the same Judge to receive sentence,

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which up to that time had never been passed, in respect of the conviction recorded against him in March. Some of the confusion of thought which has been apparent in this case may possibly have arisen as a result of the form of the notice requiring the appellant to come up for judgment. It is quite clear that no particular form of notice is required in those circumstances beyond a notice calling on the person under recognisance to come up for judgment on the date mentioned in the notice. The only Crown Office Rule which has any relevance to this matter is rule 167, which is in these terms: "If the defendant be not in custody and be under recognisance to appear to receive sentence, the defendant and his bail may be served with a four days' notice, that on a day named therein the Court will be moved for judgment. Such service need not be personal." This Court is not deciding as a matter of law that that rule has any application to a matter such as the present, but it does hold that there is no other Crown Office Rule which has any application.

We have been referred to rule 166, but its terms refer to a person not under recognisance to appear to receive sentence. We have also been referred to rules 112—115 (inclusive), but those rules relate to the old practice of filing in the Crown Office recognisances acknowledged in certain circumstances—usually on the removal of indictments into the King's Bench Division. Those rules deal with the question of what is to happen if the person at whose instance the recognisance has been entered into desires the Court to estreat the recognisance. There are various provisions for that purpose. Rule 115 provides: "Whenever it has been made to appear to the Court or a Judge that a party has made default in performing the conditions of any recognisance into which he has entered, filed in the Crown Office, the Court or a Judge upon notice to the cognisor and his sureties, if any, may order such recognisance to be estreated into the Exchequer without issuing any writ of *scire facias*: provided that nothing herein contained shall be deemed to

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take away or prejudice the right of any party to have questions of fact tried by a jury, in such cases as he might before the Crown Office Rules of 1886 be so required." Here nobody applied to any Court that the recognisance should be estreated, and it is sufficient to say that this Court is quite clearly of opinion that the above Crown Office Rule has no sort of application to the facts of the present case.

Mr. Lawton, relying on that rule, has submitted that, on the appearance of the appellant on December 5, 1938, at Swansea Assizes, he was entitled to have the issue whether he had broken his recognisance tried by a jury. The first observation to be made is that, if there is any substance in that point, it is a point which has been overlooked by generations of criminal lawyers, including many great Judges and counsel who have argued cases on this point. As far as this Court is aware, it has never before to-day been suggested to any Court that such an issue is triable by a jury, and in our opinion there is no foundation whatever for such a suggestion.

It is commonly said that a person is brought up for a breach of his recognisance, and that is a natural expression to use, though it is not an accurate one. He is in fact brought up to receive the judgment of the Court on the conviction recorded against him—in other words, he is brought up for sentence. There are many cases in which this Court has had to consider what is the proper procedure when a person who has been released on entering into a recognisance is called upon to come up for judgment. The cases, including PINE (1932), 24 Cr. App. R. 10, are all to one effect, and it has never even been suggested that there is a right to trial by jury. A person brought up for sentence in those circumstances has a right to have the breach of recognisance proved against him and he is entitled to be heard in his own defence. In this case it is not contended that Greaves-Lord, J., did not hear the appellant. Many witnesses were called on both sides and the whole matter

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was tried as if it were an issue being tried by a jury. At the conclusion of the evidence, after hearing counsel, the Judge gave judgment in which he said that it was quite clear that what had been done by the appellant at a meeting of August 21, 1938, amounted to a breach of his undertaking, and he went on to say: "In those circumstances the mercy which I showed in March when I dealt with the case was entirely misplaced. The only thing I can do is to impose a sentence which, I hope, will keep him from this sort of tittle-tattle and gossip for the future." The Court is quite satisfied that the proper procedure was adopted. It has been urged that the sentence of twelve months' imprisonment with hard labour was excessive, but the Court entirely agrees with Greaves-Lord, J., that it was a proper sentence.

The appeal, therefore, has no foundation and must be dismissed. The sentence may run from January 30, 1939, the date when the case was transferred to the list of final appeals.

Appeal dismissed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE SINGLETON AND MR. JUSTICE LEWIS.

ISAAC DAVID KETTER.

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Alien—Palestinian Citizen—Whether British Subject—Palestine Mandate — Treaty of Lausanne — British Nationality and Status of Aliens Act, 1914 (*4 & 5 Geo. 5, c. 17*), *s. 27 (1) as amended by British Nationality and Status of Aliens Act*, 1918 (*8 & 9 Geo. 5, c. 38*), *s. 2 (6)—Palestine Order in Council*, 1922 (*S. R. & O.*, 1922, *No.* 1282)—*Palestinian Citizenship Order*, 1925 (*S. R. & O.*, 1925, *No.* 777), *art.* 1.

By section 27 (1) of the British Nationality and Status of Aliens Act, 1914, as amended by section 2 (6) of the

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British Nationality and Status of Aliens Act, 1918: "The expression 'British subject' means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory."

The appellant was convicted on an indictment charging him with two offences as an alien. He appealed on the ground that he was not an alien, but a British subject. He was born in 1911 in Jerusalem and continued to reside in Palestine. He came to England in 1937, having been granted a passport which was issued by the British High Commissioner in Palestine and was entitled "British Passport, Palestine". He contended that as a result of the Palestine Mandate granted to Great Britain in 1922 and the Treaty of Peace with Turkey signed at Lausanne in 1923, all persons habitually resident in Palestine who had formerly been Turkish subjects became British subjects.

Held, that there had been no annexation of Palestine within the meaning of the British Nationality and Status of Aliens Act, 1914 (as amended), and that the appellant was therefore not a British subject, but an alien.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court before the Common Serjeant on December 13, 1938, on an indictment containing two counts: (1) that he, being an alien who had effected a change of residence from one registration district to another, failed to report his arrival to the registration officer within forty-eight hours of his arrival in the registration district into which he had moved; and (2) that he, being an alien subject to an order made by the Home Secretary varying the conditions of the grant to him of leave to land and requiring him to leave the United Kingdom by September 30, 1938, failed to comply with that order. He was sentenced to eleven days' imprisonment and was recommended for deportation.

The appellant was born in Jerusalem on November 16, 1911, of Jewish parents and lived habitually in Palestine. He came to England in 1937, having been granted a passport which was issued by the British High Commissioner

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in Palestine and was entitled "British Passport, Palestine". He obtained permission to land and to remain in the United Kingdom for a limited period, and that period was extended from time to time; but on September 14, 1938, the Home Secretary made an order requiring the appellant to leave the United Kingdom by September 30, 1938. The appellant failed to do so.

At the trial the appellant contended that he was not an alien, but a British subject. He now appealed on the same ground.

Harry Lester, for the appellant:

Under Article 22 of the Covenant of the League of Nations certain communities, including Palestine, which had formerly belonged to the Turkish Empire, were placed in a state of tutelage exercised by a Mandatory on behalf of the League. It is submitted that under the mandate given to Great Britain Palestine was transferred from Turkey to Great Britain. Palestine was then held on trust, and the legal ownership or *dominium* was vested in Great Britain. Alternatively, under Article 30 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923, which deals with transfer of former Turkish subjects, Palestine was transferred to Great Britain, so that former Turkish subjects resident in Palestine became British subjects. The Palestinian Citizenship Order, 1925, which, *inter alia*, purports to create a new Palestinian nationality, is to that extent *ultra vires* as having been made by the Mandatory under the Foreign Jurisdiction Acts instead of by the Administration of Palestine, on whom the power to make laws relating to nationality was conferred by Article 7 of the mandate. No new nationality can be conferred except by a new State or a mandated area well on the road to Statehood. Palestine was conquered by British Forces in December, 1917, and has never since been independent of this country. Where Great Britain purports to confer

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nationality by Order in Council, she can confer no nationality other than British nationality. Palestinian citizenship can only mean British nationality together with superadded rights and obligations due to the particular place of birth.

J. H. Buzzard, for the Crown:

Acquisition of British nationality is dealt with in section 27 (1) of the British Nationality and Status of Aliens Act, 1914, as amended by section 2 (6) of the British Nationality and Status of Aliens Act, 1918. The only ground, therefore, on which it could be contended that the appellant has acquired British nationality would be that there has been an annexation of Palestine by Great Britain, but there is no evidence to establish this. On the contrary, on April 23, 1923, the Council of the League of Nations passed a resolution to the effect that inhabitants of mandated territories did not possess the nationality of the mandatory Power. At the date of the coming into force of the Treaty of Lausanne, Palestine was, for the purposes of the law relating to nationality, an independent State. If the argument that the Palestinian Citizenship Order, 1925, was *ultra vires* is correct, the appellant would have retained his former Turkish nationality. He could not, in any event, have acquired British nationality. [He referred to a decision of the High Court of Palestine, ATT.-GEN. *v.* GORALSCHWILI AND ANOTHER (1925), *McNair's Annual Digest of Public International Law Cases*, 1925—1926, at p. 47.]

Cur. adv. vult.

February 21.—The considered judgment of the Court was delivered by

SINGLETON, J.: [After stating the facts, His Lordship continued:]

The only question argued before this Court was whether the appellant was an alien within the meaning of the British

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Nationality and Status of Aliens Act, 1914 (as amended). It was not disputed that he committed the offences alleged against him, if in fact and in law he was an alien within the meaning of the last-mentioned Act. By section 27 of the Act of 1914 the expression "alien" means "a person who is not a British subject". By the same section as amended by the Act of 1918 the expression "British subject" means "a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of His Majesty by reason of any annexation of territory". It is common ground that in any such proceedings as were taken the onus of proof that a person is not an alien lies upon the person himself.

At the trial at the Central Criminal Court, Mr. Lester, on behalf of the appellant, based his case wholly, or almost wholly, on the passport which was issued to the appellant, which he claimed was a British passport. The passport was unfortunately sent back to Palestine by the appellant himself, and at the trial two passports were exhibited in order to explain the difference between a British passport and a British Passport, Palestine. A British Passport, Palestine, is issued by His Majesty's High Commissioner, and the jury added a rider to their verdict that that wording was misleading, no doubt because of the words "British Passport". It is difficult to see that this of itself could lead the appellant to think that he was a British subject, and it is still more difficult to see how it could make him one.

On the hearing of the appeal Mr. Lester put his case on much wider grounds. He referred to the Treaty of Peace with Turkey, signed at Lausanne on July 24, 1923, and in particular to Article 30, which deals with nationality. That article is as follows: "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals

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of the State to which such territory is transferred." He submitted that Palestine was transferred to Great Britain, and that consequently every Turkish subject habitually resident in Palestine became *ipso facto* a national of Great Britain. He agreed that the appellant had been a Turkish subject. Certain territories which had been part of Turkey were transferred to other States, and it appears to us that Article 30 is intended to deal, and deal only, with the position of persons left in territory which was transferred. In order to show that there had been a transfer of Palestine to Great Britain, Mr. Lester relied also on the mandate for Palestine of 1922, which was confirmed on July 24, 1922. The mandate itself begins by making certain recitals by the Council of the League of Nations:

> " Whereas the Principal Allied Powers have agreed, for the purpose of giving effect to the provisions of Article 22 of the Covenant of the League of Nations, to entrust to a Mandatory selected by the said Powers the administration of the territory of Palestine, which formerly belonged to the Turkish Empire, within such boundaries as may be fixed by them; and
>
> " Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish People, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country; and
>
> " Whereas the Principal Allied Powers have selected His Britannic Majesty as the Mandatory for Palestine; and

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" Whereas the mandate in respect of Palestine has been formulated in the following terms and submitted to the Council of the League for approval; and

" Whereas His Britannic Majesty has accepted the mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions; and

" Whereas by the aforementioned Article 22 (paragraph 8), it is provided that the degree of authority, control or administration to be exercised by the Mandatory, not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council of the League of Nations:

" [The Council] confirming the said mandate, defines its terms as follows: ' Article 1.—The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this mandate. Article 7.—The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine. Article 12.—The Mandatory shall be entrusted with the control of the foreign relations of Palestine and the right to issue *exequaturs* to consuls appointed by foreign Powers. He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits.' "

None of the other articles is of much importance, except perhaps Article 5, which provides that " the Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power ".

The true effect of this is, as the recital says, that His Britannic Majesty accepted the mandate in respect of

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Palestine and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it. There was no provision in Article 30 of the Treaty of Peace with Turkey for the transfer of territory to Great Britain. If there had been, there would have been no need for the mandate.

The Palestine Order in Council of 1922 followed, on August 10, 1922, and by that Order in Council the territories to which the mandate applied were dealt with, and provision was made for the appointment of a High Commissioner and other officials in Part II. Part III dealt with the legislature, Part V with the judiciary, and Part VIII, which was general, contained three paragraphs to which I will refer: "87: The High Commissioner may by Proclamation in the Gazette at any time within one year from the date of the commencement of this Order, and provided he has previously obtained the approval of the Secretary of State, vary, annul or add to any of the provisions of this Order in order to carry out the purposes of the same, and may provide for any other matters necessary in order to carry into effect the provisions thereof. 88: His Majesty, His heirs and successors in Council, may at any time revoke, alter or amend this Order. 89: There shall be reserved to His Majesty, His heirs and successors, the right, with the advice of His or Their Privy Council, from time to time to make all such laws or ordinances as may appear to Him or Them necessary for the peace, order and good government of Palestine in accordance with the mandate conferred on Him."

In 1925 there came into being the Palestinian Citizenship Order, 1925 (S. R. & O., 1925, No. 777). That order was made, as appears from it, "by virtue and in exercise of the powers in this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested". The Foreign Jurisdiction Act, 1890, defines, in section 16, the expression "foreign country" as "any country or place out of [His] Majesty's Dominions". The Order contains two

recitals: "Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means His Majesty has power and jurisdiction within Palestine; and whereas it is desirable to regulate the grant and acquisition of Palestinian Citizenship." Paragraph 1 of the Order is as follows: "Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, shall become Palestinian citizens." The appellant was a Turkish subject habitually resident in Palestine on August 1, 1925, and *prima facie* the order would seem to make it clear that he then became a Palestinian citizen. Mr. Lester, on his behalf, argued that the order has no force or validity as it was made by the Mandatory and not by the Administration of Palestine, who were responsible for making a nationality law under Article 7 of the mandate, and that a distinction is drawn between the Mandatory and the Administration of Palestine. He said that, if certain things could only be done by the Administration of Palestine, it matters not that in the Palestine Order in Council, 1922, it was sought to reserve certain powers to the Crown, or that it was sought to exercise those powers by the Palestinian Citizenship Order, 1925. Even if we accepted Mr. Lester's argument that the order of 1925 was void and had no effect—and we are far from saying that we do accept it—the result, in our opinion, would be that the appellant had not become a Palestinian subject, but remained a Turkish subject.

Mr. Lester also argued that Great Britain had no power by Order in Council or otherwise to make the appellant a national of any other country than Great Britain. It is sufficient to say that nothing has been done in law to make him a citizen of Great Britain.

To revert to section 27 of the British Nationality and Status of Aliens Act, 1914, as amended, the appellant is not a natural-born British subject or a person to whom a naturalization certificate has been granted, nor has he become a subject of His Majesty by any annexation of territory, since

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there has been no annexation by this country of Palestine. It therefore follows that he is not a British subject but an alien within the meaning of that Act.

Our attention was called to a case in the High Court of Palestine, ATT.-GEN. *v.* GORALSCHWILI AND ANOTHER (1925), *McNair's Annual Digest of Public International Law Cases*, 1925—1926, at p. 47. The facts of that case were that an application was made by the Italian Government to the Government of Palestine for the extradition to Italy of two persons resident in Jerusalem who were charged with complicity in the fraudulent bankruptcy of a certain person in Italy. The Anglo-Italian Extradition Treaty of February, 1873, was applied to Palestine in accordance with section 4 of the Palestine Extradition Ordinance, 1924. That Treaty included a clause providing that British subjects should not be surrendered to Italy and Italian subjects should not be surrendered to Great Britain. The accused persons in Palestine were alleged to have been Ottoman subjects. They had applied for, and obtained, provisional certificates of special citizenship, which were issued by the Government prior to the enactment of the Palestinian Citizenship Order, 1925. It was contended that they should be treated as British subjects because, in the absence of a Palestinian citizenship, the subjects of a mandated territory obtained the nationality of the mandatory State. An order for their extradition was made by the President of the district Court sitting as a magistrate, who held, on the point of nationality, that the accused persons could not be treated as British subjects, and therefore could be surrendered. On application for a writ of habeas corpus to the High Court of Palestine it was held that, even assuming that the accused persons were ex-Ottoman subjects resident permanently in Palestine, they had not become British subjects, that the Crown had not acquired full sovereignty by accepting the mandate for Palestine, and that the subjects of the mandated territory did not become British subjects, and might be

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surrendered to Italy if an extradition offence had been committed by them. A note follows that an application for special leave to appeal from the judgment of the High Court to the Judicial Committee of the Privy Council was granted on February 24, 1925. The application, however, was not pursued, and no decision was given by the Privy Council on the merits of the case. It is satisfactory to know that our view in the present case accords with the view of the High Court of Palestine in the case with which they had to deal.

The appeal fails and must be dismissed.

Appeal dismissed.

Solicitor: The City Solicitor, for the Crown.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE SINGLETON AND MR. JUSTICE LEWIS.

DOROTHY KATE LARGE.

1939.
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Indictment—Manslaughter—Second Count for Lesser Charge—No Finding by Jury on Second Count—Conviction of Manslaughter Quashed for Misdirection—Substitution of Verdict of Guilty on Second Count—Other Counts not to be Included in Indictment for Manslaughter—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

The appellant was charged on an indictment containing two counts: (1) for manslaughter of a child, and (2) for cruelty to the same child, contrary to section 1 (1) of the Children and Young Persons Act, 1933. The jury returned a verdict of guilty on the first count, and intimated that they were disposed to return a similar verdict on the second count, but were discharged from returning a verdict on that count.

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The conviction on the first count having been quashed on the ground of misdirection,

Held, that, under the power conferred on the Court by section 5 (2) of the Criminal Appeal Act, 1907, a verdict of guilty on the second count should be substituted, and the sentence reduced accordingly.

No other count ought to be included in an indictment for manslaughter.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on January 17, 1939, before Greaves-Lord, J., on the first count of an indictment containing two counts charging her (1) with the manslaughter of Charles Hyde, a child between three and four years of age, and (2) that she, having been a person having the custody of Charles Hyde, wilfully ill-treated him in a manner likely to cause him unnecessary suffering or injury to his health, contrary to section 1 (1) of the Children and Young Persons Act, 1933. She was sentenced to twelve months' imprisonment.

The Judge directed the jury as follows: "Manslaughter consists in the unlawful killing of another. It means this, that the prisoner has done something in an unlawful act which brought about the death, and, if by any carelessness or by any act that she had done which you think is of a culpable character, then she is guilty of manslaughter; but you have got to find that what she has done has brought about the death." The jury having found the prisoner guilty on the first count with a strong recommendation to mercy, the Clerk of the Court said: "You also find her guilty upon the second count of cruelty to the child?" The foreman said: "Well, does not that go with the other?" The Clerk of the Court said: "I think it does, my Lord." Greaves-Lord, J., said: "I should think it is more or less included in the other. You would not find a verdict of guilty on both. I should think that if you find her guilty on the first count it is included in the latter." The foreman said: "We thought so." Then the Clerk of the Court said: "You will

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be discharged from giving a verdict upon the second count of the indictment." The indictment was marked: "Guilty on Count 1, Count 2 not proceeded with."

The appellant appealed on the ground that the Judge had misdirected the jury with respect to the degree of negligence which constituted the crime of manslaughter.

A. M. Lyons, K.C., and *F. D. Levy*, for the appellant.
G. B. McClure, for the Crown.

HUMPHREYS, J., having stated that in the opinion of the Court, in view of substantial misdirection on the degree of negligence which constituted the crime of manslaughter, the conviction of manslaughter could not stand, continued: Our attention has been called to a provision contained in section 5 of the Criminal Appeal Act, 1907. Sub-section 2 of that section provides: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity." We have heard Mr. Lyons' objection to the legality or propriety of that sub-section being adopted in this case, but in our opinion it is a right course for us to take in the peculiar circumstances of this case. The jury have indicated quite clearly that, if the matter had been left to them, they would have been disposed to return a verdict of guilty on the second count of the indictment, and they have not done so only because a superior power has directed that no verdict was required on that count. Accordingly the Court will act on the power given to them by that sub-section.

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With regard to the sentence, the learned Judge passed what may be characterised as an extremely lenient sentence, twelve months' imprisonment, on the charge of manslaughter. That being so, we think we ought not to allow that sentence to stand on what is undoubtedly the lesser charge of cruelty to a child, and, in substituting, as we do, a verdict of guilty on the second count of the indictment for the verdict of guilty on the first count, we reduce the sentence to one of six months' imprisonment.

We think it right to add that this present case appears to illustrate the difficulty which arises from an unnecessary multiplication of counts in an indictment for manslaughter. There is authority in a judgment of this Court to the effect that it is unusual, and a course which ought not to be followed, to add any other count to an indictment for manslaughter. In the present case, without any second count, the jury could have found the appellant guilty of cruelty to the child on the charge of manslaughter, under section 1 (4) of the Children and Young Persons Act, 1933. In future we think that it would be better that no other count should be added to an indictment for manslaughter. That has always been the practice in murder cases. It was formerly the practice in manslaughter cases, and this Court repeats that it should be the practice in the future.

Verdict for lesser offence substituted. Sentence reduced.

Solicitor: Edgar H. Hiscocks, for appellant.

BEFORE

MR. JUSTICE HAWKE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE HILBERY.

HENRY LESSER.

1939.
14 *March.*

Extension of Time for Leave to Appeal—Principles on which Court Acts.

Observations on applications for extension of time for leave to appeal.

Application for extension of time for leave to appeal against conviction.

The applicant, was convicted at the Central Criminal Court on December 8, 1938, on a number of charges of obtaining credit in excess of £10 without disclosing that he was an undischarged bankrupt and was sentenced by the Commissioner to fifteen months' imprisonment. On January 27, 1939, he applied for an extension of time for leave to appeal against conviction.

Malcolm Morris (*Derek Curtis-Bennett* with him) for the applicant:

Most of the charges in the indictment related to "bear" transactions on the Stock Exchange. With regard to counts 3, 5, 6 and 7, the applicant's defence was that there had been no obtaining of credit, and at the close of the case for the prosecution a submission in law was made on his behalf to that effect. The Commissioner ruled against that submission, and left the question whether there had been an obtaining of credit as an issue of fact for the jury. The jury found that credit had been obtained and the applicant was convicted on six counts. He at that time decided not to appeal, but subsequently became aware that

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in a later case at the Central Criminal Court before the Common Serjeant the same point had arisen, and that the Common Serjeant had ruled that there was no obtaining of credit and had withdrawn the case from the jury. There is, therefore, a substantial question of law to be argued if an extension of time is granted in this case, and it is submitted that it is in the public interest that that question should be decided. It is highly undesirable that at one session of the Central Criminal Court a Judge should rule on certain facts that there is evidence to be left to the jury and that at the next subsequent session another Judge should rule on similar facts that there is no evidence. It is not possible for this Court to review the Judge's decision in the latter case as it resulted in an acquittal. The above considerations do not affect counts 1 and 2 of the indictment, which arose out of a "bull" transaction, and on which also the applicant was convicted, but with regard to those counts there are other matters for argument.

No counsel appeared for the Crown.

HUMPHREYS, J.: The applicant was convicted on December 8, 1938, at the Central Criminal Court on six counts of an indictment containing seven counts, which charged him with various offences of obtaining credit to an amount exceeding £10 without disclosing that he was an undischarged bankrupt, contrary to section 155 (a) of the Bankruptcy Act, 1914. He is himself a man of education and was represented at his trial by experienced counsel. Various points of law were elaborately argued. The Judge, in his summing-up, pointed out that the facts were not in dispute and that the sole question for the jury on each count was whether on the undisputed facts credit had been obtained by the applicant. He told the jury what his own understanding of the expression "obtaining credit" was. The applicant was convicted, and quite deliberately

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decided that he would not appeal, as he had a right to do, on the questions of law.

There appears to be a danger of the rules which govern the proceedings of this Court being regarded as of no importance. The Court has listened to repeated applications for extensions of time for leave to appeal, which have been put forward as if the granting of such an application were a mere matter of form. While the Court is always willing to listen to such an application on the ground that the applicant did not understand what the points in issue were, or that he could not read or write, or on some ground of that kind relating to the particular case, it should be clearly understood that a person who has failed to appeal within the ten days allowed by statute has lost his right to appeal.

In this case the applicant, on January 17, 1939, apparently read in a newspaper that the Common Serjeant in another case had given a ruling which he thought might apply to his case. Mr. Morris has told us—and we accept what he said—that that ruling would apply to some, but not all, of the counts of the indictment on which the applicant was convicted. On those facts he asks the Court to say that an extension of time ought to be granted to the applicant. In our view, no ground for acceding to that application has been shown. The Court does not base its decision on this ground, but as a matter of passing interest it may be observed that even if the time were extended as far as counts 3, 5, 6 and 7 were concerned, the discussion which would take place before this Court would be academic, as counts 1 and 2 would still stand, and the sentence could be amply justified by conviction on those counts alone.

The application must be refused.

Application refused.

Solicitors—Ronald J. Cassells, for applicant.

BEFORE

MR. JUSTICE HAWKE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE LAWRENCE.

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Forgery—Deed of Settlement—Date of Making Falsely Stated —Whether Material—Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27), *s.* 1 (2).

On March 2, 1936, H. executed a deed of settlement on himself, his wife and the appellant as trustees in favour of H.'s son. The deed contained a power of revocation. The appellant, who was a chartered accountant, applied for return of income tax on payments made under the deed for the year 1935–36, and the amount claimed was repaid by the Inland Revenue. On May 13, 1936, the Finance Bill (which subsequently became the Finance Act, 1936) was published. The Bill provided that no deed such as the above should be effective for the purpose of reclaiming income tax on the payments made under it, unless it was an irrevocable settlement made before April 22, 1936. On May 20, 1936, the appellant, whose attention had been called to the above provisions of the Bill, executed on the deed an endorsement bearing the date April 21, 1936, which cancelled the power of revocation, but confirmed the deed in other respects.

Held, that the date April 21, 1936, was at the time when the endorsement was made material to the intention of the parties and to the purpose of the document, and the fact that it might subsequently become immaterial had no relevance to its materiality at the time in question. The document was therefore false, within the meaning of section 1 (2) of the Forgery Act, 1913 (*a*), and the statement of the wrong date amounted to forgery.

(*a*) By the Forgery Act, 1913, s. 1 (1): "For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine . . ."

By sub-s. 2: "A document is false within the meaning of this Act if . . . the time or place of making, where either is material, . . . is falsely stated therein . . ."

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Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 1, 1938, of uttering a forged deed. He was sentenced by the Recorder to seventeen days' imprisonment and ordered to pay the costs of the prosecution to an amount not exceeding £100.

The following statement of facts is taken, in substance, from the judgment. On March, 2, 1936, one Hancock, a solicitor, executed a deed of settlement upon himself, his wife and the appellant, who was a chartered accountant, as trustees in favour of his son Peter Hancock aged six. There was a power of revocation in clause 3 of the deed. This deed was sent by the appellant's firm to the Inspector of Taxes at Hounslow on April 3, 1936, with an application for return of tax for the year 1935–36. The deed was returned to the appellant's firm by registered post on April 21, 1936, and was not delivered to them until the next morning. £42 15s. 0d. tax was repaid upon this claim.

On May 13, 1936, the Finance Bill for the year 1936 was published, and it provided that no such deed should be effective for the purpose of reclaiming income tax upon the payments made under it unless it was an irrevocable settlement made before April 22, 1936. The attention of the appellant was called to this matter by a bulletin issued to him by a concern called Taxation Practical Service on May 18, 1936. On May 20, 1936, the appellant and Hancock executed upon the deed of March 2, 1936, an endorsement bearing the date April 21, 1936, which cancelled the power of revocation, but confirmed the deed in other respects. The appellant discussed the ante-dating with a solicitor. The Finance Act was passed on July 16, 1936, the wording of section 21 (10) being: "This section applies to every settlement . . . except a settlement made or entered into before the 22nd day of April, 1936, which immediately before that date was irrevocable."

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In June, 1937, the appellant applied on behalf of Peter Hancock, without sending the deed and supplemental deed back to the Revenue authorities, for a rebate of income tax, and the papers were transferred to another district. Correspondence took place between the appellant and the Revenue authorities, and on July 28, 1937, the Inspector of Taxes at Richmond, where the papers had been transferred, wrote to the appellant's firm saying that the deed of March 2, 1936, was invalid under the Finance Act, 1936. After further correspondence, on December 20, 1937, the appellant's firm sent the deed of March 2, 1936, with the supplemental deed of May 20, 1936, to the Richmond inspector for inspection, saying: "We consider that your interpretation of the matter is not correct, having regard to the provisions of the deed," but making no mention of the fact that the endorsement bearing the date April 21, 1936, had in fact been executed after that date. The official who was looking over the file, before sending the deed to Somerset House, noticed that the carbon copy of the letter sending it back a year before also bore the date April 21, and wondered how the deed could have reached the appellant on the same day. He then looked at the stamp and saw that it had been stamped on May 21, 1936.

In March, 1938, the appellant was invited to call upon the Chief Inspector of Taxes. He kept the appointment on March 15, and was told that a question had arisen upon the endorsement. Before inviting any comment, the inspector recounted the facts from the point of view of his office. He invited the appellant to make a statement and ended his observation with a caution which concluded with the words: "used in evidence against you". The appellant replied: "I think I am saying nothing." The inspector repeated his statement and his caution, and the appellant repeated that he had nothing to say, and the interview terminated. A fortnight later the appellant

wrote describing the inspector's behaviour as a theatrical display and asking on what evidence it was suggested he had committed an offence, and asking what authority there was for it. The letter was not answered. On April 26, a pair of identical letters were sent by the Inland Revenue to the appellant and Hancock, setting out the facts and pointing out that the date of the endorsed deed appeared to be falsely stated, so that the original deed as so endorsed might be treated as outside the provisions of section 21 of the Finance Act, 1936, inviting an explanation, and concluding with a different and more correct caution. The appellant replied that he had acted upon legal advice, that he was not aware that he had ever falsely stated that the date of the execution of the endorsement of the deed was April 21, 1936, and that he was now satisfied that the endorsement of the deed was inadmissible for the purpose of a repayment claim, and the claim was formally withdrawn.

Proceedings were then instituted against the appellant and Hancock, and at the trial before the Recorder, counsel for the appellant, at the conclusion of the case for the prosecution, submitted that there was no case to answer, and referred to RITSON (1869), L. R. 1 C. C. R. 200. He submitted that there was no evidence that on the date the deed was executed, that is May 20, 1936, the date of the deed was material, and that therefore the document was not a forgery and that no subsequent event could make it one. This submission was based on the failure of the prosecution to prove the existence of the Finance Bill for 1936 on May 21, 1936, or its terms. The Recorder ruled against this submission and thereupon evidence was called for the defence, in the course of which the Finance Bill for 1936 was produced and proved. After the trial, which lasted for five days, the jury found the appellant not guilty of conspiracy and forgery, but guilty of uttering a forged document.

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J. Millard Tucker, K.C. (*John Maude* with him), for the appellant:

The deed of April 21, 1936, was not a false document within the meaning of section 1 (2) of the Forgery Act, 1913. At the time of the making of the deed the date was not material. The Finance Bill was merely a Bill and not an Act of Parliament. It might never have passed into law, and in fact did not do so until July, 1936, long after the endorsed deed was executed and ante-dated. The anticipation that the Bill might subsequently become law and so render the date of the endorsed deed material was not sufficient to render it false. As the date was not material at the time when the document was made, the document was not a forgery. Unless a document is a forgery at the time when it is made, it can never subsequently become a forgery. Even if the circumstances should subsequently change, and a set of circumstances arise which would make the date material, the document, not having been originally a forgery, could never be uttered as a forged document. Further, the insertion of the wrong date was wholly unnecessary, for several reasons. If clause 19, sub-clause 9 of the Finance Bill, 1936, had been passed as an Act in the form in which it was originally published on May 13, 1936, the supplemental deed would not have been necessary, as the original deed had been made before April 22, 1936, and was "irrevocable", within the ordinary meaning of the word, at the time of the payment made thereunder, because the power of revocation did not apply to the covenant to pay the annuity, and further, consent of third parties was necessary to the revocation of the trusts and powers contained in the deed. The whole of the supplemental deed was therefore immaterial on the footing of the Finance Bill as then worded, and therefore its date was immaterial. Further, the summing-up was inadequate.

The Court intimated that they desired to hear argument for the Crown on one point only: Assuming that the deed

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was always irrevocable, would that fact make the least difference to the result of the appeal?

The Solicitor-General (*Sir Terence O'Connor, K.C.*) (*L. A. Byrne* with him), for the Crown:

That fact could make no difference. The real question is, what did the appellant think that he was doing when he inserted the date of April 21, 1936?

[HUMPHREYS, J.: The argument for the appellant appears to be that there cannot be a forgery unless something is effected thereby.] That is not the test to apply. The test is whether the alteration is material for the purpose for which the document is made. [He referred to the judgment of LUSH, J., in RITSON (1869), L. R. 1 C. C. R. 200, at p. 204.]

J. Millard Tucker, K.C., replied.

LAWRENCE, J.: In this case the appellant was convicted at the Central Criminal Court of uttering a forged deed. He was sentenced to seventeen days' imprisonment and was ordered to pay costs not exceeding £100. He was indicted together with a man named Hancock, who was acquitted, for conspiring to utter a forged deed of settlement, for forging it and for uttering the forged deed on December 20, 1937, with intent to defraud, and he was convicted of uttering only.

[His Lordship stated the facts as set out above, and continued:] It is submitted by Mr. Tucker on the appellant's behalf, in the first place, that the deed of April 21, 1936, was not a false document within the meaning of section 1 (2) of the Forgery Act, 1913, because at the time of making the deed the date was immaterial, since the Finance Bill was merely a bill and might never have passed into law, and that, therefore, the document not being a false document, the crime of forgery was not committed. This argument appears to us to involve the proposition that nothing can be material which may

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subsequently become immaterial. Such a proposition is, in our view, fallacious. On the contrary, the fact that a circumstance may subsequently become immaterial has no relevance to its materiality at the time in question. After the introduction of the Finance Bill, 1936, the time of making a settlement on children irrevocable was the most material matter to be decided upon. The date was, in our judgment, material to the intention of the parties and to the purposes of the deed. Indeed, the only reason for stating the time falsely in the present case was because the time was thought to be, and in all probability would be, all-important. Where a deed purports to be executed at a certain false time and the only reason for choosing that false time is to obtain an advantage to the parties to the deed by reason of that false time, it seems to us that it cannot be said that the time is immaterial.

The second argument which was advanced on behalf of the appellant was that the document was not a forged document, because the date was not material at the time when it was made in May, 1936, and that therefore it could not be uttered as a forged document within the meaning of section 6 of the Forgery Act, 1913, in December, 1937, even if the circumstances had by then altered. In our view it is unnecessary to decide whether this argument is sound or not, as we have already held that the date was material in May, 1936, when the supplemental deed was executed.

The third argument was that clause 19, sub-clause (9) of the Finance Bill, 1936, if it had been passed as an Act, would have left the supplemental deed untouched, because the settlement was dated March 2, 1936, and it was argued that it was sufficient, according to the true interpretation of clause 19, sub-clause (9), if the settlement was made before April 22, 1936, and was irrevocable at the time of the payment made thereunder, which in this case would be March 31, 1937. In our opinion, it is unnecessary to

decide this question, but, without deciding it, it appears to us that the interpretation put upon clause 19, sub-clause (9) is not the true or grammatical interpretation. The only result of the appellant's argument, if it were correct as an interpretation of clause 19, sub-clause (9), would be that the forgery committed was unnecessary, and it would not follow at all that the time was not material.

The next argument was that, whatever the true interpretation of the Finance Bill might be, the settlement of March 2, 1936, was in itself irrevocable; in the first place, because the power of revocation contained in that deed did not apply to the covenant to pay the annuity, and in the second place because the consent of third parties was necessary to the revocation of the trusts and powers contained in the deed. It is unnecessary for us to decide this question.

Assuming the construction which is put upon the terms of the deed, it would appear to us, although we do not decide the point, that the definition of "settlement" in section 21 (9) (b) of the Finance Act, 1936, disposes of the point. We are inclined to think that every material part of the settlement must be irrevocable.

As to the second point, we are inclined to think that, if a settlement is revocable *sub modo*, it is not irrevocable within the meaning of the Act. We are also inclined to think that the settlement could be determined within the meaning of section 21 (8) (b), since it was possible to revoke the trusts of the settlement and to institute no further *cestui que trust*. But, as I have said, in our judgment it is unnecessary for us to decide upon either the third or fourth contentions of the appellant as to the construction of clause 19, sub-clause (9) of the Finance Bill, 1936, or the settlement of March 2, 1936, because, even if those arguments are right, it merely shows that the supplemental deed was unnecessary, but does not show that

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the time was immaterial and therefore would not affect the result in this case.

Mr. Tucker also submitted that the appeal ought to be allowed on the ground that the summing-up was inadequate and in particular that the questions put by the jury at the end of the summing-up indicated that they were so confused that the conviction ought not to stand. In our judgment, there is nothing in those questions or in the way in which the Recorder dealt with them which invalidates the conviction, and we are of opinion that in general the summing-up of the Recorder adequately dealt with the questions of law and of fact with which he had to deal.

For these reasons the appeal must be dismissed.

Appeal dismissed.

Solicitors—Freeborough & Co., for the appellant; Solicitor of Inland Revenue, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE SINGLETON.

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HAROLD SIDNEY MILLS.

Jury—Necessity for Real Agreement before Verdict.

Observations on the necessity of the members of a jury arriving at a real agreement before returning their verdict.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on January 20, 1939, of obtaining a cheque by false pretences and was sentenced by the Recorder to nine months' imprisonment.

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After the summing-up the jury retired to consider their verdict. After they had been absent for nearly two hours, they sent a message to the Recorder stating that as yet they were unable to agree and asking for further direction on the meaning of "intent to defraud". The Recorder gave them further direction on that point, and continued:

THE RECORDER: I understand the other message from you is that you have not agreed upon your verdict. Is that so?

THE FOREMAN: That is so, my Lord.

THE RECORDER: Well, I will say this to you, because it has been said by a very eminent Judge in this building,* and I will repeat it to you: That it is of the utmost importance that a jury should come to a conclusion one way or the other at the end of a trial, because it is burdensome upon all concerned, including the accused, because it only means this, that, unless you do, the matter has got to be tried all over again; therefore you see the importance and necessity of coming to a conclusion one way or the other. Now this very eminent Judge said this: That where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others have got to say, come to the conclusion that they themselves might be wrong, and it would be consistent with the discharge of their duty and with their oaths under those circumstances, if they thought they were wrong, to accept the view of the majority and come to the conclusion that the majority might be right, and in that way you come to a conclusion in which you all

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* *Note.*—The reference is to the summing-up of Finlay, J., in KLEIN, tried at the Central Criminal Court in February, 1932. The case is reported on appeal at 23 Cr. App. Rep. 185 on another point. The summing-up did not fall to be considered by the Court of Criminal Appeal.

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agree by the exchange of view, and perhaps a man in the minority might say: "Well, I may be wrong." That is quite consistent with the discharge of your duty. Having said that to you, I must ask you to reconsider this matter and go back to your room, and when you come to a conclusion I will come back into Court and take your decision, so that you may be released. I cannot release you until you have come to a conclusion, and therefore I have got to ask you to retire again and consider the matter in the light of what I have said to you.

The jury retired, considered their verdict for a further eight minutes, and then returned into Court with a verdict of Guilty.

W. H. Hickin, for the appellant:

The Recorder should have told the jury that there were three courses open to them—to convict the appellant, to acquit him, or state that they could not agree. By telling the jury that they must come to a conclusion, the Recorder in effect took away from them the third course. If the case was not proved to the satisfaction of each member of the jury, the appellant was entitled to an acquittal. From the terms in which the direction was given, a minority of the jury may have thought that they ought ultimately to subordinate their views to those of the majority.

Maxwell Turner, for the Crown:

"Conclusion" does not necessarily mean finding of guilt or innocence. A final decision by the jury that they were unable to agree would equally be a conclusion. The direction with regard to the desirability of reaching an agreement purported to follow the direction given by FINLAY, J., in KLEIN (1932), 23 Cr. App. R. 185. Though it differed from that direction in some respects, it may, as a whole, be regarded as satisfactory.

THE LORD CHIEF JUSTICE: It is important to observe the very words which the Recorder used on a grave

and crucial matter. It need hardly be said that nothing could be more to be deplored than the giving of an impression to a jury that it might be right for them to appear to have arrived at an agreement when in fact they had not, or to appear to express a view which they did not honestly and individually entertain. Nothing could possibly have been further from the mind of the Recorder than to create any impression contrary to the well-recognised principle. The only question is whether the words which he used may unfortunately have conveyed a wrong impression to the jury.

[His Lordship then read the direction given by the Recorder which is set out above, and continued:] With regard to those observations, two criticisms are made. In the first place, it is said that the words, "I cannot release you until you have come to a conclusion," amount to putting pressure on the jury to appear to have arrived at a conclusion when they had not in fact done so. Of course, nothing could possibly have been further from the mind of the Recorder than to create any such impression as that. It goes without saying that the conclusion that the prisoner was not guilty would have been just as much a conclusion as a conclusion that he was guilty. More than that, a conclusion that it was impossible for the jury to agree would have been a conclusion.

The real difficulty, however, does not arise with regard to that matter. The difficulty is what may have been the effect on the minds of the jury of the following words: "Where you have got one or two, a small minority in the jury, who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others have got to say, come to the conclusion that they themselves might be wrong." The conclusion required is the conclusion that they *were* wrong. The Recorder went on to say: "And it would be consistent with the discharge of their duty and with their

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oaths under those circumstances, if they thought they were wrong, to accept the view of the majority." That would be correct only if the minority had been honestly and sincerely led to come to a view different from the view which they had previously entertained.

The criticism which has been directed against that passage is that it may conceivably have led the jury or some members of the jury to coquette with the notion that, for the sake of mere conformity or convenience, it would be consistent with their oaths to make it appear that they accepted a view which in fact they did not accept. Such a conclusion as that would be quite subversive. A loose acquiescence by a minority in the view of the majority for the sake of conformity would not merely be most undesirable, but flagrantly wrong. It is fundamental that a jury should agree, and by "agree" is meant honestly agree, not make a colourable appearance of agreeing.

It is inconceivable that the Recorder for one moment entertained any view different from this view, but the danger is that the use of certain of the expressions to which reference has already been made, taken in juxtaposition with the Recorder's final words: "I cannot release you until you have come to a conclusion," may have conveyed to the minds of the jury that it was necessary that they should appear to have arrived at a conclusion and that the minority should, for the sake of the appearance of unanimity, profess to be reconciled with a view which they did not in fact entertain. It is fundamental that a jury should not be led from a desire to acquiesce, or to avoid eccentricity, or to save time and trouble, to represent themselves as holding a view which they did not hold.

Their verdict must be a true verdict given according to the evidence, not an untrue verdict according to someone's actual or supposed convenience.

With regard to the passage of the direction of another

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Judge in another case to which the Recorder referred, there is in that direction the clearest possible distinction from the direction given in the present case. Here some of the expressions used may have conveyed to some members of the jury the impression that they might, or even that they must, appear to agree when in fact they had not done so. If that impression were conveyed, nothing could be more unfortunate. Nothing is more primary or fundamental in its character than the duty of each juror to form and express his opinion. A loose vague acquiescence would be not only indefensible, but actually wrong and a violation of his oath as a juror. No words yet used by any Judge in any Court can fairly be construed as conniving at or encouraging any such notion. There can be no doubt what the Recorder intended to convey to the jury in the present case, but he used one or two perilous phrases which may conceivably have caused some members of the jury to incline their minds to a wrong view. In these circumstances the Court has come to the conclusion that the only proper course is to allow the appeal and quash the conviction.

Conviction quashed.

Solicitor : Solicitor for Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE SINGLETON.

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TIMOTHY DACEY.

Possession of Explosives—Ingredients of Offence—Onus of Proof —Explosive Substances Act, 1883 (46 *Vict. c.* 3), *s.* 4.

The gist of the offence of knowingly possessing an explosive substance contrary to section 4 of the Explosive Substances Act, 1883, is the wilful possession by an unauthorised person of that which is in fact an explosive substance within the meaning of that Act in circumstances which would enable a jury to find that he had it for an unlawful object. It is not necessary for the prosecution to prove that such person had knowledge of the explosive nature of the substance.

Application for leave to appeal against conviction and sentence.

The applicant was convicted on March 1, 1939, at the Glamorganshire Assizes on an indictment containing two counts: (1) that he on a date named knowingly had in his possession certain explosives therein set out in such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession for a lawful object, and (2) that he knowingly had the same explosives under his control in similar circumstances contrary to section 4 of the Explosive Substances Act, 1883 (*a*). He was sentenced by CASSELS, J., to seven years' penal servitude.

(*a*) By s. 4 (1) of the Explosive Substances Act, 1883: "Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object, be guilty of felony . . ."

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At the trial evidence was given that on January 28, 1939, the police, who had obtained a search warrant to search the applicant's premises, went to his premises and found him coming out of a cellar. When told that the premises would be searched for explosives, he said: "I have a parcel downstairs which was left here about a week ago." He then produced a number of parcels, which were found to contain, among other things, a saucepan, a wooden spoon, paraffin wax and a quantity of potassium chlorate. Other explosives were found in a Gladstone bag and on a subsequent search some detonators were found hidden under the rafters of the cellar ceiling. When asked to account for these things, the applicant said that some man had brought them to his shop about a week before and had left them there.

No counsel appeared on either side.

HUMPHREYS, J. [after stating the facts]: In his application for leave to appeal, the applicant complains that the Judge omitted to explain the meaning of the word "knowingly" in section 4 of the Act. The question of the interpretation of that section does not appear to have been raised at the trial, and in the summing-up the Judge directed the jury in the terms of the section until towards the end of the summing-up he said: "What you have to be satisfied upon is, did he knowingly have these things in his possession, he knowing that they were explosive substances?" If that is what the Judge actually said, that statement must, in the opinion of this Court, have been made *per incuriam*. What the Judge meant was that the prosecution must show that the accused person was in fact in possession of explosive substances.

Though the Court is of opinion that there is no ground for granting this application, the Court thinks that it is desirable to state what the law is on this subject. In our view the law is that in a prosecution under section 4 of

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the Explosive Substances Act, 1883, the prosecution has to prove that the accused person was knowingly in possession of something which is an explosive substance as defined in section 9 of the Act, and further that the possession was in circumstances giving rise to a reasonable suspicion that it was not for a lawful object. When so much is proved, the onus is on the accused person to prove, if he can, that he had possession for a lawful object. It is not necessary for the prosecution to prove knowledge by the accused person of the explosive nature of the substance. No doubt evidence that the accused person did or did not know or suspect the use to which the substance might be or was intended to be put would be material on the question of the reasonableness or otherwise of the suspicion that possession by the accused person was not for a lawful object, but that is very different from saying that the prosecution must fail unless it can prove some degree of chemical knowledge on the part of the accused person.

The gist of the offence under section 4 is the wilful, intentional possession by an unauthorised person of that which is in fact an explosive substance in circumstances which will enable a jury to say that he had in his possession that explosive substance for an unlawful object. If that be—as the Court hold that it is—the right interpretation of the section, then there is no fear that any innocent person will ever be convicted of that offence. For if an innocent person were unfortunate enough to find himself in possession of that which came within section 9 as an explosive substance in circumstances which made it appear that there was a suspicion that he had it for an unlawful object, nothing would be easier for such innocent person than to explain the innocent purpose for which he had it, and he would be bound to be acquitted.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE LEWIS.

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Outstanding Offences—Proper Procedure on Taking into Consideration.

Observations on the proper procedure to be followed when outstanding offences are taken into consideration.

Appeal against sentence.

The appellant was convicted on March 29, 1939, at Nottingham City Sessions of larceny and was sentenced by the Recorder to three years' detention in a Borstal institution. Certain outstanding offences purported to have been taken into consideration, but there was no indorsement on the indictment to that effect.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: In the present case there was a mere statement on the part of a police officer that the appellant desired that other offences should be taken into consideration. There is no indorsement on the indictment to the effect that other cases were taken into consideration and there is nothing to indicate that the cases were put to the appellant.

The Court becomes a little weary of saying that that is not the way in which such matters should be dealt with. When it is proposed that other cases should be taken into consideration, the matter should be expressly and clearly put to the accused person. It should be ascertained with regard to each case whether he desires to admit the truth of the charge and desires that the offence should be taken into consideration. If he does, the indictment should be

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indorsed accordingly. A slack and casual treatment of such matters is not fair to anyone concerned.

[His Lordship went on to say that in the particular circumstances of the case in the opinion of the Court the sentence of detention in a Borstal institution should be quashed and an order that the appellant be placed on probation for two years substituted.]

Sentence varied.

[IN THE HOUSE OF LORDS.]

BEFORE

LORD MAUGHAM, L.C., LORD ATKIN, LORD MACMILLAN, LORD WRIGHT AND LORD PORTER.

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Gaming—Premises Used for Betting—Bookmaker—Communication of Bets from Club by Public Telephone — Whether Bookmaker a "Person Using" Club Premises—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *ss.* 1, 3.

By the Betting Act, 1853, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . betting with persons resorting thereto."

The members of a club used the club premises extensively for the purpose of making credit bets, mostly with a bookmaker P., but also with other bookmakers. The bets were made by means of two public coin-operated telephones on the club premises, the telephones being rented by the appellant M., who was tenant of the premises and carried on the business of the club. The appellants B. and L. were members of the club, and B. assisted in the management thereof. There was no ready-money betting on the club premises. P.'s office was about fifty yards from

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the club premises, and he did not visit the club for the purpose of betting. He rented two rooms above the club premises and there installed a clerk who settled accounts with the members of the club after the day's racing was over, the settlement generally taking place in those rooms. None of the appellants had any measure of control over those rooms. There was no express agreement between P. and any of the appellants that any betting facilities should be provided, but all the appellants knew and acquiesced in the method by which the betting and settlement of bets were carried on. All three appellants were convicted of conspiracy to keep a betting house. M. was further convicted of keeping, and B. of assisting in the keeping of, a betting house. All the convictions were affirmed by the Court of Criminal Appeal.

Held, that *de facto* control of the club premises by the bookmaker or the grant to him of some privilege or right in respect of them over and above those enjoyed by the public at large might have rendered him a "person using" the premises within the meaning of the above section, even without physical presence in or near them, but the mere communication of bets by public telephone between the members of the club and the bookmaker could not have that effect, and, as the jury had been misdirected in this matter, the conviction must be quashed.

POWELL *v.* KEMPTON PARK RACECOURSE CO. [1899] A. C. 143, considered and explained.

SAMUEL *v.* ADELAIDE CLUB, LTD. [1934] 2 K. B. 69, distinguished.

Per LORD ATKIN: R. *v.* DEAVILLE [1903] 1 K. B. 468 and the cases which followed it were wrongly decided in so far as they laid down permission by the occupier as the test of user.

Per LORD ATKIN and LORD WRIGHT: Where the Attorney-General grants his certificate for an appeal to the House of Lords under section 1 (6) of the Criminal Appeal Act, 1907, the appeal is not limited to the point of law of exceptional public importance in respect of which the certificate is granted. There is an appeal on all the grounds open to the Court below, and the House has all the powers of the Court of Criminal Appeal in like case, including the power to apply the proviso to section 4 (1) of the Act.

Appeals by the defendants, Florence Milne, Howard Boundford and John Charles Leonard, from a decision of

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the Court of Criminal Appeal (The Lord Chief Justice, Mr. Justice Charles and Mr. Justice Humphreys) on December 19, 1938 (*ante*, p. 18), dismissing appeals against convictions at the Central Criminal Court. The three defendants were convicted on October 29, 1938, before the Commissioner (Judge Beazley), of conspiracy to keep a betting house. Milne was further convicted of keeping, and Boundford of assisting in the keeping of, a betting house. Milne was fined £50 and ordered to pay the costs of the prosecution up to an amount not exceeding £25; Boundford was fined £25; and Leonard £25.

The following statement of facts, taken from the judgment of Lord Wright, was agreed between the parties for the purpose of the appeals:

The appellant Milne at the time of the prosecution was the tenant of the first floor of premises at 72, Bartholomew Close, in the City of London, where for over four years she had carried on the business of a club known as the Byculla Club. The appellant Boundford, who was her step-brother, had for the two years before this prosecution assisted her in the management of the club of which he was also a member.

The club had approximately 600 members, who paid a yearly subscription of 2s. 6d. until January, 1938, afterwards reduced to a shilling. Meals and refreshments, including alcoholic liquor, could be obtained at the club, which opened at 11 o'clock in the morning and closed at 7 o'clock at night, and there were facilities for playing darts. The club premises consisted of a club room (in which was a bar), a kitchen, and two other rooms. One of those rooms was extensively used by the club members for making credit bets by telephone, mostly with a bookmaker called Payne, but also with other bookmakers. There were two coin-operated telephones on the club premises, one in the passage and the other in the room above, described as extensively used for making bets by telephone. Both of the telephones were rented by the appellant Milne.

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The bookmaker, Payne, had his office situated at 43, Little Britain, some fifty yards from the club premises. Members used to make credit bets with him by telephone from the club to him at 43, Little Britain. About two years before this prosecution, Payne, who had been a member of the club for over three years, rented two rooms on the second floor of 72, Bartholomew Close, immediately above the club premises, and two months before the prosecution he engaged a member of the club named Green as a " settlement clerk " at 30s. per week and installed him on the said second floor. The rooms rented by Payne on the second floor had an ordinary Post Office telephone in them which was rented by him. There were telephone communications between Payne at 43, Little Britain, and Green on the said second floor for the purpose of informing Green the amounts won or lost on the betting transactions made by telephone from the club with Payne at Little Britain. Green on occasions left the keys of the rooms on the second floor with the appellant Milne for safe custody when he went out, and the appellant Milne was permitted to store bottles in one of them. None of the appellants had any measure of control over Payne's premises on the second floor. There was no ready-money betting on the club premises or on the said second floor.

Observation was kept in the club premises between May 18, 1938, and June 24, 1938. During that time it was established that many members while at the club premises made bets by telephone with Payne at his office at 43, Little Britain, and on no occasion was a single stake heard to exceed 10s. The amounts won or lost by members upon these bets were communicated by Payne to Green by telephone to his room on the second floor above the club premises, and after the day's racing was over members settled their accounts with Green in the rooms on the second floor, although on occasions Green came down to the club premises and settled with Mrs. Milne the winnings or losses on

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bets which she had previously made with Payne by telephone to his office at 43, Little Britain.

The appellants Milne and Boundford were present on the premises at all material times and were aware of the arrangements between Green and Payne (described above) to facilitate the payment after the races of losses and winnings on bets made by the members of the club. The appellant Leonard, who was a member of the club, was also aware of this arrangement. He attended regularly at the club on Mondays to Fridays inclusive during racing hours, and used to make up to twelve bets a day by telephone with Payne at his office at 43, Little Britain, usually for himself, but occasionally for somebody other than himself. The appellants Milne and Boundford also made bets by telephone with Payne at his office at 43, Little Britain, both for themselves and for others.

Documents in Green's possession established that the daily stakes in respect of bets made by members of the club occasionally exceeded £40, and averaged £20. During the three weeks before June 24, the appellant Leonard paid £19 19s. 2d., and the appellant Milne, mainly on behalf of others, paid £25 12s. 5d. During the observation each of the appellants was heard in the club room to refer to the making of bets or to the results of races or bets.

There was no evidence of any express agreement between Payne and any of the appellants that any betting facilities should be provided. It was not, however, denied that all the appellants knew and acquiesced in the method by which the betting and settling was carried on and that it had only so been carried on for two months before May, 1938.

Payne in his evidence denied that the mere fact that a man was a member of the Byculla Club was a sufficient qualification to open an account with him so that he could telephone his bets from the club. He said he would meet the member, perhaps at the club, and if satisfied with him, would accept his bets by telephone from the club. The

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appellant Mrs. Milne, who had an account, would often, according to the evidence, put through it bets for other members who had no account in their own name, as did also the appellants Leonard and Boundford.

The appellants appealed against their convictions and sentences to the Court of Criminal Appeal, which on December 19, 1938, dismissed the appeals. The ground of appeal was that the Judge had misdirected the jury in respect of certain directions on the law which he gave in his summing up.

A. T. Denning, K.C., for the appellants:

The substantial question raised in this appeal is, in what circumstances is credit betting by telephone unlawful? The answer depends on the language of section 1 of the Betting Act, 1853, and particularly on the meaning of the words "person using". The main contest in the present case is: was Payne, the bookmaker, a "person using" the club premises within the meaning of the section. The prosecution put their case in two steps: (1) when answering the telephone, Payne was using the premises as effectively as if he was actually physically present thereon: (2) if that telephoning went on by permission of or arrangement with Mrs. Milne, then Payne was a "person using" the premises. The defendants contended that "person using" means a person who has dominion or control of a betting establishment and conducts a betting business with persons resorting thereto; that Payne had no dominion or control over the club premises and carried on no betting establishment there; and that his establishment was at 43, Little Britain, which was not a betting house, because he did not bet there with persons resorting thereto.

The following submissions are now made on behalf of the appellants: (i) The two parts of section 1 of the Act are distinct, and credit betting falls within the first part and not the second; (ii) the word "betting" means the actual

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making of bets, not the paying or receiving of gains or losses on bets previously made; (iii) the words "persons resorting thereto" mean persons physically resorting to the premises. As a corollary, a bet made on the telephone is different from a bet made face to face; (iv) the words "person using" mean a person analogous to and of the same genus as the owner, occupier or keeper, *i.e.*, some person having dominion or control. The dominion or control need not necessarily be as of right, and *de facto* dominion or control may suffice; (v) the word "used" refers to use by such person, and "purpose" refers to the purpose of that person. His purpose must be to conduct the business of a betting establishment on the premises with persons resorting thereto; (vi) before POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143, it was held that a bookmaker was a person using premises if he habitually carried on his business there, though it was not essential that he should have permission of the owner or exclusive control. After that decision the trend of subsequent decisions has been that a bookmaker is not a "person using" unless he carries on his business by permission of or arrangement with the owner or some authorised servant who holds more than an inferior position. It is submitted that the latter decisions are wrong in so far as the permission of or arrangement with the owner has been introduced as a test; (vii) the correct view is that it is lawful for a bookmaker to receive in his own office credit bets by telephone and to encourage that business by advertisement or arrangements with clubs, but it is not lawful for him by himself or his servants to control a place on which there is a telephone for the purpose of persons resorting to that telephone and making bets with him. If he controls the sending end of the telephone, that may render the sending-end a betting house.

The decision in POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) really turned on the question whether the book-

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makers were persons using the enclosure. This appears from the speech of Lord Halsbury, L.C., and the majority of the House. The test of using must be one of control, and there must be the conduct of the business of a betting establishment on the premises by a person having control. SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, was decided by Atkinson, J., on the ground that the defendant was a person procured, and does not cover the present case, in which no question of procuring arises. The question of user was not really dealt with in that case.

The Court of Criminal Appeal in the present case held that Payne was a person using the premises by reason of the existence of the permission of or arrangement with the owner. Some kinds of arrangement importing a degree of control might amount to user, but in the present case Judge Beazley never told the jury in his summing-up what kind of an arrangement would be necessary and left the matter entirely undefined.

Some assistance may be derived from an examination of the cases relating to betting in public-houses. The cases decided before POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) established that the offence was constituted by user, and the permission of the owner was not relied on as a test. The subsequent cases introduced permission of or arrangement with the owner as a test, and so far as that test has been adopted, it is submitted that those later cases were wrongly decided and that the *ratio decidendi* of POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) has been misunderstood. The error is first apparent in BELTON *v.* BUSBY, [1899] 2 Q. B. 380, which was relied on in the judgment of the Court of Criminal Appeal in the present case, and appears most conspicuously in R. *v.* DEAVILLE, [1903] 1 K. B. 468. It appears now to have been established that, in order to convict the bookmaker, it must be shown that the publican also is liable to be convicted, at any rate where there has been no localisation of the betting. It has been

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assumed that the decision in R. *v.* DEAVILLE (*supra*) applies to clubs. It is submitted that an undefined arrangement with the owner of the premises cannot convert into using that which would otherwise not be a using. If a bookmaker sits in his office and receives bets by means of the telephone, he is a person using his office for the purpose of betting, but he is not a person using the place from which any of the telephone messages is sent. The same principle applies even if a large number of persons telephone from one place such as a club. [He then criticised a number of passages in Judge Beazley's summing-up.]

H. C. Leon, following for the appellants:

The error in the summing-up and in the judgment of the Court of Criminal Appeal arose from a misunderstanding of the judgment of Atkinson, J., in SAMUEL *v.* ADELAIDE CLUB (*supra*). The point decided in that case was that, when bets were made at a club by means of telephoning to a bookmaker, the club was being used for the purpose of betting. It was not decided that in such circumstances the bookmaker was a person using the club premises. Moreover, if a bookmaker who is telephoning to a member at a club is using the club premises, the member must equally be using the bookmaker's premises. If such user constitutes resorting, and if the parties are face to face with each other at the bookmaker's premises, the backer is presumably resorting to the bookmaker's premises, and every bookmaker who accepts telephoned bets is committing an offence.

J. G. Trapnell, K.C., for the Crown:

It is important to consider the nature of the arrangement between the bookmaker Payne and Mrs. Milne, especially in the light of Payne's own evidence on that matter. Under the arrangement Payne was assured of an additional clientèle and the club of additional members. The primary question which arises on this appeal is whether communication with the club premises by means of the telephone can constitute a use of them by the bookmaker within section 1 of the

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Betting Act, 1853. Such use must be supported by some kind of agreement between the bookmaker and the owner or occupier. Where there is a telephone conversation to a bookmaker from club premises or from a public telephone box in the ordinary way, the person telephoning cannot be treated as resorting to the premises of the bookmaker. It appears not to be disputed on behalf of the appellants that if the bookmaker in the present case had communicated with the club by means of a private line, that would have amounted to user by the bookmaker. Communication by means of a public line may equally amount to user, only the matter of proof may be more difficult. The arrangement disclosed by the evidence is an arrangement giving special facilities to members of the club for having their bets accepted with less inquiry than a bookmaker would ordinarily make.

With regard to POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*), the observations of Lord Halsbury, L.C., in that case were of limited application. The real *ratio decidendi* of that case was on the question what constituted a "place" within the meaning of the Act. There was no question of any arrangement of any kind between the bookmakers and the racecourse company. It was emphasised, too, that no betting business had been carried on by the racecourse company, and that there had been no betting between them and persons resorting to the enclosure.

On the question of user, it is not necessary that the bookmaker should have been physically present on the premises alleged to have been improperly used or that the whole of the transaction should have been carried on there. It is sufficient that any essential part of the betting transaction, such as the request to accept a bet, should have taken place there. The direction given to the jury was in the circumstances adequate.

Edward Clarke, following for the Crown:

It is clear from the decision in SAMUEL *v.* ADELAIDE CLUB,

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LTD. (*supra*) that the club premises were used for the purpose of betting. To bring Payne within the category of forbidden persons as a person using, proof of an arrangement between him and the owner providing him with special facilities over and above other bookmakers would be sufficient. The special facilities must be of a substantial nature, and must put the bookmaker into a position analogous to that of the owner or occupier for the purpose of betting. The evidence in the present case was sufficient to entitle the jury to infer the existence of those facilities.

A. T. Denning, K.C., in reply:

In POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) the question of the use of the enclosure by the racecourse company was not the only issue. There was the further issue whether the racecourse company permitted the use thereof by others, and the position of the bookmakers, therefore, directly arose for determination. In the speeches of the learned and noble Lords a distinction was drawn between a person being on a place and a person using a place. That decision established control as being the decisive factor. Control may be either *de jure* or *de facto*, and may be exclusive or non-exclusive, but it is the test which ought to be adopted. Subsequent cases, and in particular R. *v.* DEAVILLE (*supra*), which have introduced permission or arrangement as the test, have been either wrongly decided or have proceeded on a wrong reasoning. With regard to the use of a private telephone line, it is conceded that communication with premises by a bookmaker by that means, though it would not *per se* render him a person using those premises, would be strong evidence to show that persons on the premises were his agents or that there had been procurement of him by them. Either of the above arrangements would bring the bookmaker within the Act as a person using the premises, and no other kind of arrangement would have that effect. Where the telephone line used is a public one, entirely different considera-

tions apply. A bookmaker may lawfully receive in his office bets by telephone and may encourage arrangements to that effect, so long as he does not himself use the place to which the persons communicating with him resort for the purpose of telephoning.

The House took time for consideration.

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LORD MAUGHAM, L.C.: My Lords, this is an appeal from the decision of the Court of Criminal Appeal of December 19, 1938, in the matter of the convictions of Florence Milne, John Charles Leonard, and Howard Boundford, under the Betting Act, 1853. The appeals of those persons to the Court of Criminal Appeal were dismissed and the persons convicted have each of them presented petitions of appeal, the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance having been duly obtained.

The facts will be carefully stated by my noble and learned friend, Lord Wright, whose judgment I have had the advantage of reading, and I will not detain your Lordships by going through them. It will be sufficient to say that the indictments were based on a conspiracy to keep a betting house, and on the keeping of a betting house, contrary to section 1 of the Betting Act, 1853, and one of the appellants—namely, the appellant Boundford—was charged with assisting in keeping a betting house, contrary to section 3 of the Betting Act, 1853. The trial took place before Judge Beazley and a jury. The three appellants were found guilty. The appellant Milne was sentenced to pay a fine of £50, and the appellants Boundford and Leonard were sentenced to pay a fine of £25. The appeal to the Court of Criminal Appeal was based on the contention that the learned Judge had given a wrong decision on a question of law, that there had been certain misdirections, and that there had been a miscarriage of justice. In the Court of Criminal Appeal, which consisted of the Lord Chief Justice,

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Charles and Humphreys, JJ., it was held that there was no ground for interfering with the convictions, and the appeal was dismissed.

[His Lordship summarised the facts and continued:] This summary is not in any way intended to represent the whole of the case against the appellants, for which reference should be made to the judgment of my noble and learned friend, Lord Wright. For the purpose of my remarks I propose to assume that the club premises were used mainly as a betting club; that all three appellants were fully aware of the methods employed for facilitating betting by members; but, on the other hand, that the bets were made on a public telephone with Payne (and sometimes with other bookmakers) who did not come to the club premises for that purpose. I should add that the learned Judge, on the authority of a case which I shall consider later (SAMUEL *v.* ADELAIDE CLUB, [1934] 2 K. B. 69), was of opinion that the use of the telephone by Payne or others for the purpose of making bets with members was such a use of the club premises as would justify the jury in finding that the position was precisely the same as if the bookmaker was actually on the premises, or was standing at the door of the club and making bets with the members. The Court of Criminal Appeal adopted the same view. One of the questions which your Lordships have to decide is whether this view, which formed part of the directions to the jury, was correct.

In the present instance we are dealing with a case where there was "an office, room or other place used for the purpose" of betting taking place with "persons resorting thereto". The rooms, as I have said, were a part of 72, Bartholomew Close, and the "persons resorting thereto" were the members of the Byculla Club, which occupied those premises. The question, "what is a place?", which in other cases has occasioned a good deal of doubt, does not arise here. The difficult question is in relation to the activities of the bookmaker Payne. It is beyond dispute that

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betting is not an unlawful act and that no offence is committed by opening, keeping, or using a club for the purpose of the members betting with each other. To justify a conviction under sections 1, 3 and 4 of the Act the place must be opened, kept, or used for one of the two purposes mentioned in section 1. The first purpose is the one asserted to apply here, that is, it is said that the place was open, kept, or used for the purpose of certain specified persons betting with (in this case) the members of the club. These persons must be in one or more of the following descriptions, or categories: "(1) the owner, (2) occupier, or (3) keeper thereof, or (4) *any person using the same*, or (5) any person procured, or (6) employed by, or (7) acting for or on behalf of such owner, occupier or keeper or person using the same, or (8) of any person having the care or management, or (9) in any manner conducting the business thereof." (I have supplied the numbers for the sake of clarity, and have italicised the words which are said to apply.)

It is alleged for the prosecution that the bookmaker Payne "used" the club rooms for betting with the members who were there, and the question is: Did he so use them within the meaning of the word "use" in that part of section 1 of the Act? To avoid misconception I will add that the difficulty is not as to the word "use" in the preliminary words "shall be opened, kept, or used", as to which there is no trouble in the present case, but as to the words employed in the description of the first purpose mentioned in the section—namely, in the sentence "for the purpose of the owner, occupier, or keeper thereof or any person using the same". In what follows I am mainly confining my remarks to the meaning of "person using the same" in this part of the section.

The Betting Act is certainly not a model of good drafting, and a generation of Judges has been puzzled by it. The numerous decisions with regard to the sections cannot altogether be reconciled, and, on the other hand, it is, I

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think, impossible for this House wholly to disregard them and to start *de novo*. It is, moreover, plain that we are bound to follow the decision of this House in POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143, if and in so far as it applies.

It may be useful to attempt a simplification of the first and the third sections of the Act. For that purpose I shall employ the word "place" for the words "house, office, room or other place", the word "used" for "opened, kept, or used", and the words "designated persons" for the nine classes or categories I have above mentioned. With these abbreviations, sections 1, 3 and 4 would in substance run as follows:

Section 1. No "place" shall be "used" (1) for the purpose of any designated person betting with persons resorting to such place; or (2) for the purpose of any money or valuable thing being received by or on behalf of any of the designated persons (*a*) as consideration for any promise or agreement to pay thereafter any money or valuable thing on any event relating to sport or exercise, or (*b*) as consideration for the paying or giving by some other person of any money or valuable thing on any such event.

(The "places" so employed are then declared to be common nuisances and contrary to law.)

Section 3. Any person, being an owner or occupier of any "place" or a person using the same, who shall "use" the same for either of the purposes mentioned, and any person being the owner or occupier of any "place", who shall knowingly permit the same to be "used" by any other person for either of the purposes; and any person having the care or management of or assisting in conducting the business of a "place" "used" for either of the purposes shall on summary conviction be liable to a fine of £100 or six months' imprisonment.

Section 4. Any person, (*a*) being an owner or occupier of any "place" "used" for either of the purposes men-

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tioned, or (*b*) acting on behalf of such owner or occupier, or (*c*) having the care or management or assisting in conducting the business thereof, who receives money or any valuable thing as a deposit on any bet on condition of paying any money, etc., on the happening of any event or contingency relating to any race or any fight, game, sport or exercise, or as consideration for any promise or agreement to pay money on such event, or (*d*) giving any acknowledgment or receipt purporting to entitle the bearer to receive money on any event, shall be liable to a fine of £50 or three months' imprisonment.

Some points on these somewhat artificial provisions are worth noting. Section 1 deals with the user of the place for one of two defined purposes, and the user is made a common nuisance and illegal. The sanctions are in sections 3 and 4 and they both refer to the user of the place for one or other of the purposes mentioned, but the sanctions are more severe under section 3 than under section 4. It may be noted in passing that under section 3 the persons mentioned in six of the categories above mentioned (the owner, occupier, keeper, the person using, the person managing, and the person conducting the business) are made liable, but it omits the persons procured, and the persons employed on behalf of the owner, etc., and the agent of the manager. Section 4 inflicts the lower penalty on all the nine classes or categories who receive money, etc., as a deposit or on a promise to pay, or who give an acknowledgment or receipt.

As I have already said, the question arises whether Payne was a "person using" the place, that is, the club premises; and, in order to answer this question, it is necessary to determine as a matter of construction what meaning is to be given to the word "using", having regard to its association with the words "owner, occupier, or keeper" of the place. The "person using" may clearly procure or employ, or appoint an agent to bet, but that does not take us very far. It is also clear (from section 3) that a person using

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the place may use it for the purpose of some person using the place betting with persons resorting thereto, and that the owner or occupier may permit the place to be used by any other person for the purpose of some person using the place betting with persons resorting thereto. The constant repetition of the word "using"—not always it would seem in the same sense—is one of the circumstances that have given rise to decisions which are not very easy to reconcile.

The important case of POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) must now be considered. It did not arise on a prosecution under the terms of the Betting Act. The matter was brought before this House by means of a friendly action brought by a shareholder in the company against the company for the purpose of obtaining a decision as to the legality of the betting carried on in an uncovered enclosure of about a quarter of an acre adjacent to the racecourse, to which enclosure the public, including bookmakers, were admitted on payment of a small entrance fee. The injunction was to restrain the use of that part of the company's premises for what was alleged to be an illegal purpose, and the question before this House was whether the purpose for which the enclosure was in fact being used was illegal. If it was, the injunction ought to have been granted; if not, the action ought to have been dismissed. It may be mentioned that there were one or two hundred professional bookmakers accustomed to attend in the enclosure, and from five hundred to two thousand members of the public, most of whom entered the enclosure for the purpose of backing horses with the bookmakers. The bookmakers, who were accompanied by their clerks, did not use any apparatus, such as a desk, stool, umbrella or tent, but particular bookmakers were usually to be found in or near the same part of the enclosure calling the odds to attract backers. This use of the enclosure was known to, and permitted by, the company.

The trial Judge was the Lord Chief Justice, Lord Russell

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of Killowen, who, on the authority of HAWKE *v.* DUNN, [1897] 1 Q. B. 579, gave judgment for the plaintiff and granted the injunction. The Court of Appeal, consisting of Lord Esher, M.R., and five Lords Justices, allowed the appeal (Rigby, L.J., dissenting). But in the elaborate judgments the main point was taken to be whether the enclosure to which I have referred could be described as a " place " within the meaning of the Betting Act, 1853, ss. 1 and 3. In this House the appeal was dismissed, and HAWKE *v.* DUNN (*supra*) was overruled. There were only two speeches with full reasons for the decision of the noble Lords, the elaborate speech of Lord Halsbury, and a shorter one by Lord James of Hereford. The former was concurred in as regards the conclusion by six Lords. Lord Watson stated that he was of the same opinion " for substantially the same reasons ". Lord Macnaghten and Lord Morris simply concurred in the motion proposed by the Lord Chancellor. Lord Shand was of the same opinion. Lord James of Hereford concurred in the proposed motion on the ground that the enclosure was not within the word " place " on the true construction of the sections already referred to. Lord Herschel, who was present at the hearing, and who saw the judgment of the Lord Chancellor but did not live to hear it delivered, had concurred in the views expressed by the Lord Chancellor. The Lord Chancellor of Ireland, who had assisted at the hearing, said that he also agreed with the judgment proposed to the House. On the other hand, Lord Hobhouse and Lord Davey delivered dissenting judgments.

It should be noted at the outset that Lord Halsbury stated that he did not think that the important question was what is a place. He said that any place, which was sufficiently definite and in which a betting establishment might be conducted, would satisfy the words of the statute. From his speech it seems that his view as to the true ground on which the case fell for decision was the meaning to be given to the word " use " or " using " in the phrase " for the pur-

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pose of the owner, occupier or keeper thereof, or any person using the same . . . betting with persons resorting thereto ". And, after criticising the reasoning of Lord Hobhouse and Lord Davey, he said ([1899] A. C., at p. 160): " It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto." A little later he said: " It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high road. There is no betting establishment at all, and there is no keeper of one."

It is important to note that Lord Halsbury expressed strong approval of what he called the " luminous judgment " of A. L. Smith, L.J., in the Court of Appeal, and I think it is desirable to quote a passage from that judgment which Lord Halsbury must, I think, be taken to be approving. The learned Lord Justice observed, after an elaborate consideration of the various sections ([1897] 2 Q. B. 242, at p. 276): " If a person carries on the business of betting in a place akin to a betting-house, whether such place is set up upon

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a racecourse or elsewhere, then he is guilty of the betting made illegal by the Act, for he is then carrying on the business of a betting house in a prohibited place. There must, however, be an user such as takes place in the keeping of a betting house or office to be within the Act, and the user of a place in common with mankind in general is not such an user as is contemplated by the Act. It is this user of the prohibited place for the business of betting which is struck at by the Act."

My Lords, I am not able to take the view that this House is bound to accept the language of Lord Halsbury as if the words employed were those of a statute. The phrase which I have quoted, which requires that the character of the use must be a use by some person having the dominion and control over the place, is a phrase which, I think, cannot be regarded as being expressed in technical language. The word " dominion ", as its derivation shows, is one which in strictness indicates that the person has a legal right over the place and can in general exclude others by virtue of that dominion, and I doubt very much whether the word " control " is used in a sense indicating that the person has either the right of legal control or of exclusive control. I am confirmed in my opinion by the view that a succession of Judges during the last half-century has given a somewhat wide meaning to the phrase in question. I cannot think that at this date it would be possible to doubt that dominion and control must include dominion or control *de facto*. I agree with the judgment of the Lord Justice General in the Scottish decision of YOUNG *v.* DARRAH, [1929] S. C. J. 17, at p. 21, when he said: " I think Lord Halsbury's *dictum* must be interpreted, not necessarily to refer to any kind of *de jure* dominion or control, but to include dominion or control *de facto*." I do not take the view that this means that the user in question is equivalent to the popular sense of the words " making use of ", and if there must be some description of the limitation which, I think, should be placed

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upon the phrase "person using the same", I prefer the language of A. L. Smith, L.J., with which, as I have said, I think Lord Halsbury agreed, that the user must be such as takes place in the keeping of a betting house, or, I will add, the carrying on of some kind of betting business in some localised place in order to come within the Act. I doubt whether it is satisfactory to substitute for the words "dominion and control" a reference to permissive user, or an introduction of what I may call the doctrine of permission. Admittedly there was a permissive user in the KEMPTON PARK CASE (*supra*). Nor do I think it is proper to divide the racecourse decisions from those relating to other premises, except so far as the actual facts of each case may require different considerations arising from those facts. Finally, and this is the decisive feature, as I think, as regards the question with which I am dealing, I can find no words in any part of the Act, including the preamble, which justify the view that the user involves a dominion and control, using the words in the ordinary legal sense.

The quesion must now be answered: Did Payne by employing public telephones for the purpose of sending and receiving messages to and from the members in the club so communicate with, or make such an employment of, the club premises that he was "a person using the same" within the meaning of the Act? The answer, if I am right so far, must depend on whether the user was in a fair sense a user similar or analogous to that which takes place when an owner, occupier, or keeper of a house or place carries on a betting business there with persons resorting to it. Before we answer this question, we should consider what the position would be if Payne had sent letters, or telegrams, through the post office to members of the club at the club premises. Would that make Payne "a person using the club" within the section? If so, what shall we say if the members of the club take the initiative and ring up the bookmaker, who merely answers by quoting the odds and accepting the bets?

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Does he "use" the premises if he merely uses a public telephone for that purpose? Does a man who speaks to a house, whether near or distant, by means of a public telephone for any purpose "use" the house within the sense of that word in section 1 of the Act? If the view which I have indicated as to the meaning of the decision in the KEMPTON PARK CASE (*supra*) is accepted, it does not seem to me possible to answer these questions in the affirmative, because there is in truth in such cases (assuming there is nothing more to indicate user of the place) no use similar or analogous to that which exists when an owner, occupier, or keeper carries on a betting business in the place.

My Lords, I think we are driven to the conclusion that the owner or other persons in control of the place who open, keep, or use it for the first purpose mentioned in section 1 of the Act are only doing something illegal if the "user" is one which involves that the betting with persons resorting thereto is carried out by the owner, occupier, or keeper, or by a person using the place in a popular sense who, if not present by himself or some agent or nominee, is permitted to exercise, or, in fact, exercises, some *de facto* control or some privilege or right over the place in question not being a control, privilege, or right possessed by the public at large. Such a conclusion might be arrived at if the owner, occupier or person using the place received a commission on the bets, or if they permitted the bookmaker to instal and use a private telephone, or if they allowed him to stand outside at an open window and to call out the odds. Other examples might be given of permission, express or implied, extended to the bookmaker in, near, or over the room or place for the purpose of enabling him to make bets with persons resorting there which would be special to him, and not given to the public, and clearly allowed to him merely for the purposes of betting. In those cases the surrounding circumstances may well establish that there is such a user of the place as comes within the grounds of the decision

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in the KEMPTON PARK CASE (*supra*). I am unable to see in this case how the mere use of the public telephone by Payne is sufficient to establish the offence against the appellants. They doubtless knew that Payne was ringing up members and being rung up by them, and they doubtless in a sense "permitted" these things; but how could they prevent them if there was a public telephone? Members were doing nothing unlawful by communicating on the telephone and making bets with a bookmaker. It may be observed in this connection that bookmakers, who send and receive from their offices messages by telephone or telegram which lead to, or which are the evidence of, betting contracts, are not liable under the Act, because the persons with whom they bet are not "persons resorting" to the house, office, room, or other place where the bookmakers carry on their business; for resorting must imply a physical presence to or close to the place: see R. *v.* BROWN, [1895] 1 Q. B. 119. To prevent misconception I should add that "user" does not in my opinion necessarily imply a physical presence in or near the place, if the circumstances above referred to exist.

My Lords, as I have said, the question before the House in the KEMPTON PARK CASE (*supra*) was not concerned with a conviction under the Betting Act, and Lord Halsbury was accordingly not called on to express any opinion as to the question which should be submitted to the jury in a prosecution under the Betting Act. Your Lordships are not in that fortunate position, but it is not possible to do more than to indicate the general lines on which the jury should be directed in such a case, since the circumstances vary to an almost unlimited extent.

I will add a few remarks on the case of SAMUEL *v.* ADELAIDE CLUB, LTD. (*supra*). The plaintiff had leased premises to the defendants on condition that they should not be used for any illegal purpose. The defendants permitted a social club to occupy the premises. They made

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an arrangement with a bookmaker for facilitating bets by the members with him, and private telephones were installed between the club premises and the bookmaker's office. A commission was paid by him to the club on all bets made by the members through him. The decision of Atkinson, J., was that the defendants were permitting the premises to be "used" for the purpose of a person (the bookmaker) "procured" by the club as occupiers of the place betting with the members as persons resorting thereto. In my opinion this decision was quite correct. The learned Judge also expressed the view that a person so "procured" by the occupier must be "procured to bet for the benefit of the occupier". That was the fact in the case before him, and it would almost always be a reasonable inference from the circumstance that the occupier had so procured the person in question. It should be noted that the case turned on the phrase "any person procured or employed by or acting for and on behalf of such owner, occupier, or keeper, etc.". It did not turn on the meaning of the words "or any person using the same".

My Lords, if the views above expressed are accepted, it must follow that the directions given by the Judge on the trial of this case were incorrect, and that the convictions of the appellants cannot stand, and should be set aside. The appeals should accordingly be allowed.

LORD ATKIN: The appellants were convicted at the Central Criminal Court at a trial before Judge Beazley and a jury on indictments which charged them with offences against the Betting Act, 1853. They appealed to the Court of Criminal Appeal under section 3 (*a*) of the Criminal Appeal Act, 1907, that is, on grounds of appeal which involve questions of law alone. No leave of the Court of Criminal Appeal was asked; and therefore no question of fact, apart from law, is or can be raised. The Court of Criminal Appeal dismissed the appeals. The Attorney-General granted his

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certificate that the decision involved a point of law of exceptional public importance and that it was desirable that a further appeal should be brought, and thereby enabled the appellants to appeal from the decision to this House (section 1 (6)).

I mention the section in order to support the view that, whatever be the point of law upon which the Attorney-General grants his certificate, once it is granted there is "a further appeal" to this House upon all the grounds open to the Court below. The appeal is not limited to the point of law of exceptional public importance, which indeed is not specified in the certificate. The result is that this House is armed with all the powers of the Court of Criminal Appeal in like case, and amongst other matters may act upon the proviso to section 4 (1), if it were to consider that, though the point of law was wrongly decided, no substantial miscarriage of justice had occurred.

The facts and contentions have been so fully set out in the opinion of my noble and learned friend Lord Wright that I need not recapitulate them. I would only say that I am not impressed by the novel procedure in this case of providing an "agreed statement of facts". Speaking generally, facts cannot be agreed in a criminal case, and in fact we were referred at some length to the evidence as recorded in the shorthand note.

I wish in the first place to call attention to the form of the charges made against the appellants in this case; for it appears to me that some confusion has arisen in the books and in the practice in dealing with the sections of the Betting Act, 1853. Section 1 of the Act, in my opinion, is directed, by way of suppression of the evil mentioned in the preamble, to making the keeping or using a house, etc., for the purposes mentioned a common nuisance. No penalty is imposed; for the persons responsible would be guilty of a common law misdemeanour. They could only be proceeded against by indictment, and the punishment would

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be that applicable to common law misdemeanour, that is, a fine without limit of amount with or without imprisonment for a term not exceeding, now, I think, two years. But in addition to the remedy by proceedings against a common nuisance, the Act, by section 3, constitutes a criminal offence which may be committed by the persons named in the section in the manner specified, the obnoxious purposes being taken from section 1 which specifies them for the purpose of defining the common nuisance. These offences are only triable summarily before any two justices of the peace, and on conviction the "penalty" imposed may be any sum not exceeding £100 and the offender may also be imprisoned with or without hard labour for any period up to six calendar months.

In any case it is plain that proceedings under the two sections are mutually exclusive. The one constitutes an indictable offence, the other a summary offence; and the penalties under the latter have no relation to the former. Before 1879 offences under these two sections could not be tried together. By the Summary Jurisdiction Act, 1879, however, a person charged with a summary offence under which he was liable to imprisonment for a term exceeding three months could claim to be tried by a jury, and thereupon the offence is for all purposes to be deemed, as regards that person, to be an indictable offence. This means that a person charged under section 3, if he elects to be tried by a jury, will be committed as though the summary offence were an indictable offence and will be indicted accordingly. The indictment therefore will be under section 3 and will follow its terms. But the ordinary procedure in indictable cases will be followed, and the indictment may, therefore, contain any charge which would be justified on the evidence disclosed in the depositions, and may, therefore, no doubt contain a charge so supported for causing a common nuisance under section 1. The question arose in R. *v.* BROWN, [1895] 1 Q. B. 119. The accused, having been charged

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before the justices as the occupier of a house for using it for the purpose of betting with persons resorting thereto, elected to be tried by a jury, and the indictment contained a count making this charge and also other counts charging him with using the house for ready-money betting, and also using the house without alleging that he was occupier. The Court of Crown Cases Reserved held that all these counts were in order, being founded on evidence disclosed in the depositions. Hawkins, J. ([1895] 1 Q. B., at p. 131) incidentally seems to express the construction of section 1 to which I have referred. He had already in R. *v.* PREEDY (1888), 17 Cox C. C. 433, at p. 436, expressed the same view: "The object of the first section undoubtedly was to render liable to prosecution for causing a public nuisance any person who, having the control over any house or other place, used or sanctioned its use for the illegal purposes mentioned. The third section, however, had, as it seems to me, a very much more extensive object in view, namely, to render liable to pecuniary penalties not only those who being owners or occupiers themselves kept or used or permitted the use of any house or place for the prohibited purpose, use, but also those who, though not owners or occupiers, actually used," etc.

In this case the appellants were, as we are told, charged before the Court of summary jurisdiction under section 3. They elected to be tried before a jury. But when the indictment is looked at, it will be found that only in the case of Boundford was any charge made against them under section 3. He was charged with assisting in conducting the business of premises used for the purpose of persons using the same betting with persons resorting thereto. All the appellants were charged with conspiracy to effect a common nuisance, on which count alone Leonard was convicted. And Milne was on count 2 charged with the offence of as occupier using the premises for the purpose of persons using the premises betting with persons resorting thereto, and,

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though convicted on counts 1 and 2, was only sentenced on the second count. The offence charged in that count was stated to be "keeping a betting house contrary to section 1", and the count appears to have been clearly defective under that section for not alleging the common nuisance.

I have examined, I think, all the cases reported as offences under this Act. In all the cases after 1879 but one the accused seems to have elected to be tried on indictment, and the indictments quite properly follow the words of section 3. In the one case excepted (R. *v.* DEAVILLE, [1903] 1 K. B. 468) there is no indication how the case came before the Recorder of Hanley, who stated the case for the Court of Crown Cases Reserved. But I think there can be little doubt that it would be on proceedings originally taken summarily. In the only case I have found tried on indictment before 1879 (R. *v.* CRAWSHAW (1860), 8 Cox C. C. 375), the counts of the indictment based on the Betting Acts plainly alleged a common nuisance. I venture to think that the form of indictment to be found in *Archbold's Criminal Pleading, Evidence and Practice* (30th ed.), p. 1,373, which is said to be for keeping a betting house contrary to section 1 of the Betting Act, 1853, is mistaken. It would be correct if expressed to be contrary to section 3. If under section 1, it omits to charge the common nuisance. The note wrongly imports the penalties from section 3.

The appellants have not relied on defects in the form of the proceedings as grounds of appeal, but, inasmuch as this House has the opportunity of reviewing the law on this difficult topic, I have thought it desirable to comment on the proper procedure.

On the merits of the appeal, before discussing the alleged misdirections in point of law complained of, it seems desirable to formulate for oneself what is the law against which the appellants are said to have offended. No question here arises as to the appellants being owners or occupiers of the

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premises in question, for in the counts on which they were convicted the material charges were that they *used* the premises for the purpose of persons *using* the premises betting with persons resorting thereto. There is there the double application of the " using " which is also to be found in the statute. The charge is not that they used the premises to bet with persons resorting thereto, but that they used the premises for the purpose of a third person, in the present case a known person, Payne, a bookmaker, using the premises for betting with persons resorting thereto. Incidentally, I think that the indictment was clearly faulty for not stating the name of the person alleged to have used the premises for the betting purpose. When known, the particulars should be given; where unknown, it should be so stated. The precedent in Archbold above referred to in this respect is correct. I am myself not clear that in the section the two " users " are not intended to be the same person *reddendo singula singulis* to owner, occupier or user, so that the present offence should be covered by the express words in the section " knowingly or wilfully permitting the same to be used by *any other persons* for the purposes aforesaid ". Otherwise it is not easy to see the necessity for the words quoted.

But assuming that the section can be construed in the way suggested by the prosecution, there are at least two essentials of the offence: (1) That a house, office, room or other place is used; (2) That the house, office, room or place is used by some person for betting with persons resorting thereto.

(1) The present case does not raise the question whether the premises in question are a place within the meaning of the Act, the debated question which is supposed to have been decided in POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143. That case seems to be relevant here only in the guidance it gives as to the meaning of " using " in connection with house, office, room or place. In the present case there can be no question as to the premises

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being a house or room. But as the argument discussed fully the cases dealing with room or place, and the supposed decision of this House in POWELL'S CASE that no room or place can fall within the section unless the person using it for betting has dominion or control over the room or place, I think it desirable to say something on that topic. I doubt whether it would be said that the majority of the learned Lords taking part in the decision expressed their assent to the particular words of Lord Halsbury relied on ([1899] A. C., at p. 160). But it seems to me clear that when he referred to " the character of the use by some person having dominion and control over the place " he was not confining himself to legal dominion and control. They would be inadequate words to express use by a person having a licence from the true owner. But I cannot think that Lord Halsbury meant that if a bookmaker took possession of an unoccupied house or premises and there, without the knowledge of the lawful owner, carried on the business of betting with persons resorting thereto he would not be committing an offence. An apparent dominion and control must be sufficient to satisfy Lord Halsbury's words. It seems to be agreed that the use of an umbrella or stand on an unauthorised racecourse would be the use of a place. Could it be relevant that the use of the umbrella or stand had escaped the attention of the owners of the course? So in the public-house cases I cannot see why if the bookmaker uses the bar of the public-house for betting in conditions which make it an offence if committed with the permission of the licensee of the premises, exactly similar user fails to be an offence if done without the licensee's permission. The user appears to be the same in both cases. I think therefore that R. *v.* DEAVILLE (*supra*), and the cases that followed it were wrongly decided so far as they laid down the test of permission by the occupier.

(2) What then is the meaning of using the premises for the purpose of betting with persons resorting thereto? It

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is conceded that it does not apply to members of a club using the club premises and therein betting with other members of the club. It is a different kind of user from that of the persons who resort to it for betting. Further, it seems to me primarily to convey the idea of physical presence at the place. That does not exclude a secondary meaning which must be discussed, but primarily it has the meaning suggested, and there will hardly be found a case in the books where the ultimate offender "using the premises for betting" was not, in fact, by himself or his agent on the premises.

It is on this aspect of the case that things were said in the Courts below that have no doubt led to the certificate being given which authorised this appeal. The learned trial Judge used language which, perhaps, was sufficient to convey to the jury that telephoning was not enough, though he did say: "You must be satisfied that there was some definite arrangement between Milne and himself that he should be there for that purpose. . . . The intervention of the telephone does not eliminate the user and take the bookmaker outside the forbidden persons." But in the judgment of the Court of Criminal Appeal these words occur: "It was said—in SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69—that it could not be said that in that case the bookmaker was using the premises, because he was only telephoning to the premises. As Atkinson, J., pointed out, and as this Court is clearly of opinion, it is the right and only view that a person who uses the telephone by permission of the owner of the premises to telephone and continue telephoning the whole afternoon to the members of the club is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them. It is his voice which reaches the members at the other end of the telephone, and the oral arrangement which is sufficient to make the bet is made on the telephone in exactly the same way as if those persons were face to

face instead of being separated as they were at a distance of fifty yards."

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Fifty yards was the distance between the club and Payne's offices. One would agree that if the bookmaker stood at the door and made his bets verbally with the members, he would be using the premises for betting with the members. It cannot matter whether it was during the whole afternoon or less, and it cannot matter whether he did so with the permission of the owner or not. But I entirely disagree with the notion that when two persons converse on the telephone they are to be considered for any purpose of locality to be both face to face. It seems to me to be an unscientific conception which is plainly wrong. If A in London speaks to B in Manchester, are they face to face in London or in Manchester or in both? And if the parties are in London and Paris, or Ostend, or New York, is the same proposition true? And if A, the bookmaker, when telephoning to B, his customer, at the club, is face to face with him at the club, is B, the customer, face to face with A at the bookmaker's office? And if so, is B resorting to the office? I think that, though it is true that bets can be made by telephone and may be completed according to circumstances either at the club or at the bookmaker's office, the bookmaker, while at the office, is not using the club: any more than the butcher or the baker is using his customer's residence when orders are given and accepted over the telephone. And if this is so, it surely can make no difference that the owner of the premises "permits" the use of the telephone. The use of the telephone, therefore, does not constitute the bookmaker a user of the premises so that he can be said to be physically there. On the other hand, it is plain that he may be using the premises for betting if an agent is there conducting betting business for him. I also think that he can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place

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where he is carrying on his betting business. I do not think that he need have any legal right of occupation; or that he need be a partner with the actual occupier. Payments made to the occupier or keeper or user of the premises, either by way of commission or otherwise, for the privilege of betting with the persons resorting to the premises, the installation by the bookmaker on the premises of facilities for betting with him, such as a private telephone or possibly a private letter-box, the provision by the occupier, etc., of the premises of special messengers to convey betting communications, or special facilities given on the premises for the reception of such messengers, special facilities given to the occupier for procuring betting credit for the persons resorting to the premises (as suggested in the present case), might well afford evidence on the question of fact whether the bookmaker was, in fact, carrying on his business on the premises.

Possibly none of these facts would be sufficient of themselves, but in every case it must be a question of fact for the jury whether the business was carried on as stated, and a question of law for the Judge whether there is any evidence to satisfy the onus of proof which exists in every criminal case. It would have to be pointed out that the business on the premises need not be the whole or even the principal part of the betting business. In this respect it does not seem to be necessary to decide that the occupier had, in fact, "arranged" with the bookmaker that he should carry on his business there. As I have said, premises can be "used" in contravention of the Act without the permission of the occupier; but it will be obvious that the kind of evidence that I have suggested would not usually exist without the consent of the owner.

I have not dealt with the case of the occupier procuring a bookmaker to bet with persons resorting to the premises. The facts suggested above might also be evidence of "procuring", a question of fact which was decided against the occupier in the case of SAMUEL *v.* ADELAIDE CLUB, LTD.

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(*supra*). There was, no doubt, evidence to support such a finding. The only objection to the decision is that it led to the view as to telephoning taken by the Court of Criminal Appeal in the present case. For the reasons I have given, so far as it suggested that the two persons telephoning are in personal contact at the place where the message is received or sent, it seems to me, with respect, to be wrong.

The question then to be considered by the tribunal of fact, whether justices or jury, when a charge is made that a bookmaker has used premises for the purpose of betting with persons resorting thereto, is the same whether the bookmaker has been actually present on the premises or not. Has he, in fact, been carrying on his betting business there, betting with persons resorting thereto? And the jury should be warned and justices should remember that the fact has to be established beyond reasonable doubt as in all criminal proceedings.

In the present case I think all your Lordships are of opinion that the summing up did not sufficiently define the offence, and that the convictions must be quashed on that ground. I will not enumerate the various passages which are assailed by the appellants. It is sufficient to say that, though the Judge repeatedly warned the jury that it was not sufficient to show that in fact bets were made by telephone with Payne, yet he repeatedly told them that the offence would be constituted if they were satisfied that in addition an "arrangement" existed between Payne and the appellant, Mrs. Milne, but he never defined what that arrangement must be. "You must be satisfied", he said, to give one instance, "that there was an arrangement between him, Payne, and Mrs. Milne, that betting should take place". He then went on to say: "If you are satisfied that there was an arrangement, tacit if you like, but which was perfectly well understood, that it was to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had; that

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the room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you, it may be a useful pointer to you when you consider what Green said, that it was an arrangement with the club that the room was there—if you are satisfied of that, then the offence was committed." For the reasons I have given, this passage does not appear to me to state at all accurately or definitely the true issue. But standing alone, in my view, it would be sufficient to cause the convictions to be quashed, for the learned Judge, no doubt inadvertently, upon the very issue which he had repeatedly told the jury they must find —namely, an arrangement between Mrs. Milne and Payne—told the jury that the statement of Green, which was evidence only against himself, was evidence against Mrs. Milne of that very arrangement. I am myself quite unable to follow the passage in the judgment of the Court of Criminal Appeal which says: "The expression 'it may be a useful pointer to you' is not quite the same as saying—indeed it is a different thing from saying—I direct that you may consider that evidence." Surely any member of a jury told that a fact referred to was a pointer towards a conclusion at which he was invited to arrive would think that he was being told that the fact would guide him to the conclusion: in other words, that it was not only evidence but strong evidence of the conclusion. At any rate I know that I should. In view of the unsatisfactory evidence as to the alleged arrangement this direction might well have led to the convictions. For these reasons I am clearly of opinion that the appeals should be allowed, and the convictions set aside.

LORD MACMILLAN: My Lords, I agree with the opinions which have been expressed by my noble and learned friends, the Lord Chancellor and Lord Atkin, and also with those about to be expressed by or on behalf of my noble and learned friends Lord Wright and Lord Porter, all of which I have had the advantage of reading in print.

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LORD WRIGHT (after stating the agreed statement of facts and referring to the summing up, continued): The two main objections to the summing up are: (1) that the jury were told that Payne, in receiving at his own office bets telephoned by the members from the club premises, was as much using the club premises as if he were personally present in them; and (2) that the jury were not instructed what kind of arrangement between Milne and Payne might constitute a user of the club premises by Payne for betting with persons resorting thereto. Both these objections turn on the construction of the essential provision of the Act which forbids the using of any house, office, room or other place for the purpose of the owner, occupier, or keeper thereof or any person using the same (in this case Payne) betting with persons resorting thereto. There is no question that the club premises constituted a "place" or that the members were persons resorting thereto. The question is: Was Payne using the club premises for betting with the members resorting thereto? The two main objections to the summing up thus involve two separate questions, but, though they are distinguishable and have to be considered apart from each other, they involve under associated aspects the question of law: What is the meaning of "using" the premises for the purpose specified?

On the first point it is said that Payne used the club premises for the purpose of betting with the members resorting thereto, because the members telephoned from the premises the bets to him and he accepted them by telephone to the members who were in the club. This seems to me to be a distortion of the ordinary meaning of a plain word "using". The people who use the club premises for telephoning the bets are the members, not Payne, who in turn uses his own premises to telephone the answer. The mechanical device of the telephone enables people at a distance to speak to each other and hear each other's voices, but it does not change the local position of each speaker

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or *per se* make Payne a person using the premises at which at the moment he is not. How far the respondent's contention is removed from ordinary parlance becomes obvious when it is seen to follow from it that the local tradesman who accepts a telephoned order from my cook is, on that view, using my house; similarly, that when a member of an ordinary social club telephones a bet from the club to his bookmaker, the bookmaker is using the club. In this connection distance would be immaterial. If a man telephones from England to a bank in New York, can he be said to be using the bank premises in New York, or if the banker replies, can he be said to be using the premises of his interlocutor? I am for the moment treating this point in abstraction, as indeed it must be considered. Nor can the accuracy of the abstract proposition that a person, who telephones to another person who is in other premises, is thereby using those premises, be affected in any way because the telephoning is repeatedly done or because it is done in the course of betting. The question which for the moment must be separately examined is simply whether the bookmaker is using the premises to which he telephones. If he is not, then the further and more complex question of user of the premises for the purpose of betting with persons resorting thereto does not arise unless there are further circumstances showing such user. The Court has no right to give an unnatural meaning to a plain word because the particular mechanical device was undreamt of at the time of the Act, or because it might be thought that the particular operation is within the mischief of the Act. The Act must be construed according to the natural meaning of the language used, all the more so since it is an Act creating a criminal offence. It is for the Legislature, if they so desire, to amend the law to meet the new circumstances.

In my opinion the Judge misdirected the jury when he told them that the intervention of the telephone did not eliminate the user. He went on to say: "You can see that

for yourselves, because what is the position supposing the bookmaker was present and that what was said on the telephone was said to him in person? Then clearly the premises would be used for the purpose of making bets." The latter statement is correct. The misdirection is in treating the use of the telephone as shifting the local situation of the bookmaker from the place in which he actually was and which he was using to the club premises, which not he but the club member who resorted thereto was using, quite lawfully so far as he was concerned, for the purpose of making bets. It follows that I cannot agree with the perhaps clearer statement to the same effect on this matter made by the Court of Criminal Appeal to which I have referred. If a similar statement is involved in the judgment of Atkinson, J., in SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, I do not agree with it. That case was a case of "procuring" under section 1 of the Act, and is not directly material in this case.

The second objection, which is different in principle and requires separate consideration, turns on the references by the Judge in his summing up to an "arrangement" between Mrs. Milne and Payne, which would justify the jury in finding that Mrs. Milne was using the premises for the purpose of Payne using them for his betting business. I do not question that there might be an arrangement such as to make Payne a person using the premises, though he was not personally upon them. For instance, it might have been proved that Mrs. Milne was simply a nominee or agent of Payne, and in that way Payne, though not physically on the premises, was using them by her instrumentality in the conduct of his betting business with the members. Short of so clear a case, the same result might be achieved by a less obvious machinery. The actual occupier of the house, office, room or place might be in partnership with the bookmaker, or in some other way the premises and the business of betting done thereon might be conducted by the occupier

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and the bookmaker on a joint basis of co-operation in some form or other. I do not attempt to imagine all the schemes which ingenuity and desire of gain might devise to enable the bookmaker to use the premises for his betting business without appearing to do so. The scheme might depend on a variety of concurrent circumstances. For instance, if a private telephone was installed in the club premises, especially if it was done at the cost of the bookmaker, for use by the members for betting with him and the occupier of the premises was paid a commission on all bets telephoned, these circumstances, perhaps combined with others, might constitute evidence on which a jury would be entitled to find that the bookmaker was using the house or place for betting with persons resorting thereto.

I am not attempting to exhaust the possible permutations and combinations of fact which the jury might have to consider. It must be a question of fact for the jury or for the justices in all the circumstances of the particular case. The vice of the Judge's summing up under this aspect is that he gave the jury no guidance what they had to consider or what they had to find in order to convict. There was, in fact, so far as I can see, no evidence of any arrangement between Mrs. Milne and Payne which would justify the conclusion that the former was using the premises for the purpose of Payne using them for his betting business. So far as the evidence went, the club was used indeed for betting, but it was so used by the members, which was not unlawful. The presence of Green in the separate premises on the floor above no doubt was a convenience in the prompt settlement of bets, but in itself it was legitimate. Payne gave no special facilities to the members, and Mrs. Milne used the open account of her own which she had with Payne to make bets for members with Payne, so far as appears, in order to help the members, not Payne. This is all that appears on the evidence, and is consistent simply with the position that Payne's business was the bookmaker's

business which was most largely, though not exclusively, patronised by the club members. The Judge never warned them what sort of arrangement they would have to find between Mrs. Milne and Payne before they could find that Payne, though not personally present and conducting a betting business at the club premises, was, in fact, using the premises for that purpose. All he did was to speak vaguely of Mrs. Milne being identified with Payne, or of an arrangement that it should go on. I do not think that convictions by a jury who were left in such confusion as to the facts, of which they must be satisfied before they could convict, can be supported. This is a matter larger than and distinct from the mere use of the telephone. And it is a further defect of the summing up that the two matters are confused and never separately put before the jury by the Judge, and thus the defectiveness of the summing up is aggravated.

I have not found much assistance from the cases cited, except in so far as they illustrate such general propositions of law as that it is not unlawful for members of a club to bet with each other, or with bookmakers. Some reference was made to Lord Halsbury's phrase in POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143, at 160, that under the Act the illegality depends on " the character of the use as a use by some person having the dominion and control over the place and conducting the business of a betting establishment with persons resorting thereto ". It is not clear, but I shall here assume that Lord Halsbury's speech represented the opinion of the majority of the House. It may be that these words would, if taken in their full and literal significance, at once rule out Payne from the category of a person using the club premises. But equally they would rule out other cases where the offence has been held to have been committed, rightly as I think, such as the case of the bookmaker who used a slag heap on waste land as the place for his betting business, or the workman in Scot-

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land who without the knowledge or permission of his employers used the room in which they were allowed to have their dinner to conduct a betting business with his fellow workmen: YOUNG *v.* DARRAH, [1929] S. C. J. 17. I agree with that decision. A like case would be that of a bookmaker who without the permission of the publican or any authorised agent of his carried on his betting business in the bar of the public-house. Permission is, I think, immaterial in cases of this type, if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier. I think Lord Halsbury meant no more by these words than such *de facto* dominion and control as enabled the bookmaker to ply his trade in the place. I do not need further to discuss the much-canvassed KEMPTON PARK CASE (*supra*), which does not seem to throw light on the questions discussed here. There is here obviously no question that the club premises were potentially a place within the meaning of the Act. The question whether they were used in the prohibited manner turned on considerations different from those in the KEMPTON PARK CASE (*supra*).

On the questions of procedure discussed by my noble and learned friend Lord Atkin, I agree with what he has said.

In my opinion the convictions appealed from cannot stand, and the appeals should be allowed.

LORD PORTER (read by Lord Macmillan): Your Lordships have already heard from the speech of the noble and learned Lord, Lord Wright, what are the facts proved in evidence and that the question to be determined is whether the learned Judge's summing up was accurate in point of law or adequate in point of fact. In considering these questions it is necessary to bear in mind exactly what the charge was and to eliminate the possibility of a conviction for some other offence.

Your Lordships have not analysed the evidence for the purpose of considering whether a conviction for offences other than those of which the appellants were found guilty could have been supported; and no question arises whether a charge of opening, keeping or using the Byculla Club for the purpose of a person procured or employed by or acting for or on behalf of the owners betting with persons resorting thereto could have been sustained.

If, then, the charge actually preferred alone be considered, the question of the correctness of the summing up and the liability of the appellants may be adequately discussed by confining the attention to count 2 of the indictment, that is, that against Milne for using the premises for the purpose of a person—namely, Payne—using the premises betting with persons resorting thereto. It is unnecessary to consider the question of conspiracy, since, to be convicted of that offence, the parties would still have to conspire to commit the offence charged in count 2.

In the present case no question arises whether there was a defined place such as directly arose in POWELL *v.* KEMPTON PARK RACECOURSE CO., [1899] A. C. 143. The house, the user of which is complained of, is identified—the charge is of user of the Byculla Club. Nor is there any question whether persons resorted thereto or that those persons used the club for betting with Payne. The evidence was ample to prove both facts. But the matter to be determined is not whether the club premises were used for betting—as indeed they were. It is rather whether Payne used them for betting with the members.

Apart from authority, I should have said that a *de facto* user of the premises must be proved, but that a *de jure* user is unnecessary. X may commit an offence by using the place for the purpose of X himself using the premises betting with persons resorting thereto or by using it for the purpose of Y using the premises betting with such persons; and in the second case Y also commits an offence

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under section 1. But Y, who is himself merely a user, may commit an offence even if the owner or occupier is ignorant of his action, provided that his acts constitute a user of the premises for the purpose of Y betting with persons resorting thereto. In either of the first two cases X must have some sort of control over the premises, otherwise he could not use the premises. So likewise in the second and third cases must Y have some measure of control and for the same reason, but neither the one nor the other need be an owner, occupier or keeper. A defined place and sufficient control over it to stay there and bet with persons resorting thereto would seem enough. But there must be a place to which people can resort and sufficient occupation of it in fact by some person to enable them to bet with him.

So far as Milne is concerned, the evidence showed that she was tenant of the premises and carried on the club, and the place was opened, kept or used—any of the three words is appropriate—by her. Moreover, it was used for the purpose of Payne betting with persons resorting thereto —namely, the members. Those matters are not in question, but are not enough to support a conviction. In order that the conviction may be affirmed, Payne must, it is true, bet with persons resorting to the premises, but he must also use the premises for that purpose.

What then is meant by "user"? No doubt physical presence might be enough, and though the mere opening of the house for the purpose specified before any actual betting took place would constitute an offence, yet as a rule some evidence of repetition would be required to show the purpose for which the premises were opened, kept or used. User through a servant or agent, including a partner, would also, I think, suffice. Some physical control such as a private telephone connecting other premises with those alleged to be used might be enough, and some sharing of profits or payment for the privilege of betting with members might constitute a user of the premises, but I doubt if it

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is possible to find a formula which would fit all cases. The draughtsman of the Act has adopted the word " user ", and though the wording might have been clearer, I doubt whether any more definite word would express the meaning more accurately.

If no general definition is possible, one is thrown back upon a consideration of the evidence in the present case to discover if there was in fact a user by Payne. It is true that he was a member of the club, but there is no evidence that he used the club premises in any different way from the other members except that Green came down from the room above and settled members' accounts either by collecting or paying money. But that is not to bet, but to settle bets which have previously been made and is no offence under the section : see BRADFORD *v.* DAWSON, [1897] 1 Q. B. 307.

It is true also that Milne had a betting account with Payne and was accustomed to use that account in order to place bets, and at times to pay winnings to or recover losses from members, but to do so is, *prima facie*, to act as agent for the members and not as agent for Payne, and though her action constitutes a user of the premises by the members for betting with Payne it does not constitute a user by Payne for betting with the members. Nor in my view is the fact, even if established, that Payne would accept members of the club as clients more readily than outside persons a user of the premises. I doubt whether an expectation, even if justified, or even an arrangement, that members of the club would receive special consideration from an individual bookmaker, would, without more, constitute a user of the premises by that individual. But no such arrangement was proved or found by the jury to exist and it is not necessary finally to determine this question.

Finally, it was suggested on the authority of SAMUEL *v.* ADELAIDE CLUB, LTD., [1934] 2 K. B. 69, that Payne might be said to be present at the club because Milne or the club

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members were accustomed to use a particular room in order to make bets with Payne by telephone. But the telephone was a public one and, though the members no doubt used the room for betting, Payne did not. If he were held to have done so, then a bookmaker might be said to use any premises from which his clients communicated with him. But it is said the primary use of the room was for telephoning to and receiving messages from Payne as a result of which bets were made either on the club premises or at Payne's offices. If an arrangement had been proved between Milne and Payne that the room should be reserved for Payne's purpose or even partially so reserved, that might amount to a user by Payne, but no such reservation was proved and in any case the summing up was not directed to the existence of any such arrangement, or indeed of any defined arrangement.

It was to this last aspect of the case that the appellants directed their main attack against the summing up. Some arrangements between Milne and Payne, they acknowledged, might constitute a user of the premises by Payne, but the learned Judge who tried the case never directed the attention of the jury to the kind of arrangement required, but left them to imagine that any arrangement aiming at the encouragement of betting between Payne and members of the club was sufficient.

The learned Judge says that Payne need not be there, and adds: "If an important part of the transaction such as telephoning the bets is done on the premises, and you come to the conclusion that it is in pursuance . . . of some arrangement between Milne and Payne, that would be sufficient to bring Payne within the description of a person using the same." Elsewhere he speaks of "an arrangement between Milne and Payne that it"—presumably telephone betting—"should go on", and again of "a tacit arrangement between these two that it would be a very fine thing for the club to get this sort of thing going on there and

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that it should be done", and of Payne thereby "being identified with the owner". Later, he says that there must be some definite arrangement between Milne and Payne that Payne should be there for the purpose of betting with members, and adds: "The mere fact that the bets were telephoned does not take the case out of the Act." Later again he says, after speaking of the room which Payne had hired in the same building as the Byculla Club: "If you are satisfied that Payne had that room there and that Payne had these bets with the members—I mean bets in the sense that they were telephone bets—and that it was all in pursuance of an understanding between him and Mrs. Milne, I do not think you will have very much hesitation in coming to the conclusion that those club premises were used consistently for the purpose of bets being made through the telephone with Payne and that Payne was in fact a person using those premises for the purposes of betting with persons resorting thereto."

Finally he says: "You have got to be satisfied of two things; that the club premises were used for the purposes of betting and that Payne was a person using those premises for the purpose of betting with the persons resorting thereto in the sense I have endeavoured to describe. The onus of proof is on the prosecution to satisfy you of that. You must be satisfied that there was an arrangement between him, Payne, and Mrs. Milne that betting should take place. Mr. Clarke in his final speech to you went so far as to say that Mrs. Milne procured Payne to carry on that business; he went so far as that, but I do not think it necessary that you should go so far as that. If you are satisfied that there was an arrangement, tacit if you like, but which was perfectly well understood, that it was to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had, that that room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you it may be a useful pointer

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to you when you consider what Green said, that it was an arrangement with the club that that room was there—if you are satisfied of that, then the offence has been committed."

I have quoted in each case from that part of the summing up complained of and at the end I find it difficult to ascertain what the suggested arrangement was. An arrangement; an arrangement that it would be a very fine thing for the club to get this sort of thing going; an arrangement that Payne should be there for the purpose of betting, and he might be there though bets were telephoned; the taking of the upstairs room and telephone bets with members in pursuance of an understanding; an understanding that the members should be able to telephone bets to Payne and Payne should have Green on the spot to make settlements; a procurement of Payne is not necessary; it is enough if there was an arrangement that Payne should have the connection with the club which he undoubtedly had. Those are the explanations given of the kind of arrangement required to make Payne a user of the premises. I do not think that they give sufficient guidance. There was no evidence that the upstairs room was taken under an arrangement with Milne except a statement of Green, which would not be admissible against anyone but him: yet the jury might possibly have thought that taking the room upstairs was a sufficient arrangement and would in any case consider telephone betting a contravention of the Act provided it was done with Milne's connivance.

No case gives any real measure of support to the present decision. The Court of Criminal Appeal base their judgment substantially on the ground that the learned Judge left to the jury the question whether there was an arrangement between Milne and Payne that Payne should have facilities for betting with members of the club, and that Payne might none the less be using the club though he spoke only through the telephone. "A person", they said, "who

uses the telephone by permission of the owner of the premises to telephone and continues telephoning the whole afternoon to the members of the club is acting in exactly the same way as if he stood at the door and made bets with the members". For this statement they quoted SAMUEL *v.* ADELAIDE CLUB, LTD. (*supra*). But that case was decided, so far as the bookmaker was concerned, not on the ground that he was "a person using" the premises, but on the ground that he was "a person procured" by the owner. In the present case no question of procurement arose and the jury neither found nor were asked to find that Payne was given any special privileges in the club itself, though like anyone else he could telephone or be telephoned to.

Many cases have been decided on the terms of the section, mostly with reference to the meaning of the word "place", but also with reference to the "user" required to create an offence.

Both matters were discussed in POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*). That case is primarily a decision as to what is a "place", and determines that Tattersalls' ring, in which many bookmakers congregate, is not a place within the meaning of the Act inasmuch as no bookmaker, though usually to be found at a particular spot, takes his stand at an individual place nor has any particular spot been allotted to him. He is free to bet on any part of the course, and though the owners of the course know that he goes to Tattersalls' ring, yet they do not set aside any particular part of the course for his use. The appeal was heard by ten Lords of Appeal and of those four appear also to have held that "user" was not established unless the person using had some sort of control over the place used; and two more concurred in the general result. Lord Halsbury, L.C., who delivered the leading speech, indicated that in his view the person using the place must occupy a position analogous to an owner, occupier, or keeper of the place, and that unless he did so there was no user such

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as was contemplated in the wording of the section. The action was a civil one brought by a shareholder of the defendant company claiming an injunction to restrain that company from opening or keeping the enclosure known as Tattersalls' enclosure for the purpose of persons using the same for the purpose of betting with persons resorting thereto. Its object was to test the correctness of the judgment in HAWKE *v.* DUNN (*supra*), which, being decided upon a case stated, was not appealable beyond the Divisional Court. In HAWKE *v.* DUNN it was held that a bookmaker who carried on the business of betting in Tattersalls' ring at Hurst Park was guilty of unlawfully using that enclosure for the purpose of betting with persons resorting thereto, contrary to section 3 of the Betting Act, 1853. POWELL *v.* KEMPTON PARK RACECOURSE CO. (*supra*) in effect overruled that decision.

In neither case, however, was any *de jure* user proved—the bookmaker had no more rights in the ring or elsewhere on the course than any other member of the public; and no *de facto* user was established because no particular place was set aside for or used by any particular bookmaker. Moreover, though the result was concurred in by all save two of their Lordships, I do not think that the majority necessarily endorsed the observations of Lord Halsbury in full. In so far as those observations may seem to indicate that the section requires a *de jure* user before an offence can be committed, they must, I think, be read in the light of the matters there in issue. So read, they do not conflict with the interpretation which I venture to think the Act bears. But whatever their meaning, they give no support to the respondent's contentions in the present case.

I would allow the appeals and quash the convictions.

Order of the Court of Criminal Appeal reversed.
Convictions quashed.

Solicitors—Docker, Andrew & Co., for the appellants; The City Solicitor, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

ALBERT GEORGE WINFIELD.

1939.
10 *October.*

Character of Prisoner—Sexual Offence—Impossibility of Putting in Issue Character for Sexual Morality Only—Summing-up—Absence of Proper Direction on Corroboration—No Corroboration in Fact—Conviction Quashed.

The appellant, who was charged with indecent assault on a woman, called a witness and asked her questions to establish his good character with regard to sexual morality. The witness was cross-examined by the prosecution on the appellant's previous convictions of offences involving dishonesty.

Held, that the cross-examination was proper, as the appellant had by his questions put his general character in issue, and that he could not claim to be protected as having put in issue a part of his character only.

Observations on the necessity for a proper direction on corroboration in a sexual case, and on the effect of the absence of such direction, when in fact there was no corroboration.

Appeal against conviction.

The appellant was convicted at Middlesex Sessions on July 7, 1939, of indecent assault on a married woman, and was sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour.

At the trial the appellant, who was not defended by counsel, intimated that he desired to call a witness "to speak on my behalf as to my behaviour generally". The Deputy-Chairman warned the appellant of the danger of calling the witness, but the appellant insisted on calling her and put to her the following questions: "Have you ever known me misbehave myself before ladies or with ladies?" and "Tell the Court with regard to my character

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and behaviour." The witness replied: "Most exemplary as far as I am concerned, and, as far as I know, I am perfectly certain that he would not resort to that kind of behaviour of which he has been accused." The witness was then cross-examined by the prosecution as to a number of previous convictions of the appellant of offences involving dishonesty.

J. C. Burge, for the appellant:

In the circumstances the appellant should not have been cross-examined with regard to his general character. He was unrepresented at the trial, and though admittedly the Deputy-Chairman did give him some warning of the danger of calling the witness, he did not represent to him that by so doing he would put his general character in issue. The appellant was not seeking to introduce evidence of his general character, but only of his character with regard to women. Secondly, the summing-up was unsatisfactory. There was no corroboration of the complainant's evidence, and no adequate warning was given to the jury of the danger of convicting without corroboration.

G. G. Raphael, for the Crown:

It is conceded that the corroboration in this case was of a shadowy character, and that there was no sufficient direction on corroboration in the summing-up, but the Court might consider that the case is one where the jury must inevitably have come to the same conclusion even if they had been given a proper direction.

HUMPHREYS, J.: Two points have been taken by counsel for the appellant. The first is that his character, which was a bad one, was improperly allowed to be introduced in the course of the trial. In the opinion of the Court, there is nothing in that point. The prosecution did not seek to introduce his character, but the appellant himself, against the advice of the Deputy-Chairman, insisted on calling a

witness to whom he put questions about his character with regard to women. The Deputy-Chairman knew, though the appellant probably did not, that there is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half. A prisoner, who has a bad character for dishonesty, is not entitled to say that he has never acted indecently towards women and claim that he has not put the rest of his character in issue. If a prisoner chooses to put his character in issue, he must take the consequences. It is quite clear that the appellant did put his character in issue by asking questions about his character quite apart from the facts of the case. The result was that he was properly cross-examined as to his character.

The second point is more serious, and relates to the inadequacy of the summing-up. In cases of a sexual character it is eminently desirable that the evidence of the complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent a jury from convicting on the uncorroborated evidence of such complainant, but it is the established rule of this Court that the presiding Judge must direct the jury in such a case on the desirability of there being corroboration of the complainant's evidence. This was a case in which, in the opinion of the Court, there was no corroboration. The complainant's story was not, on the face of it, unreasonable, and her conduct was consistent, inasmuch as she afterwards made a complaint, but there the case for the prosecution ended. The appellant's answer was a complete denial. The Deputy-Chairman told the jury: "I think it my duty to give you a warning that in sexual matters, even where there is corroboration, you must always scrutinise the evidence of the woman with care." It is extremely difficult to follow what that means. Whether the jury would understand it to mean that in his opinion

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the case was one where there was corroboration of the complainant's evidence, I do not know.

This Court has said over and over again that the direction which must be given in such a case is a clear and plain direction on the desirability of corroboration. It is impossible to say that the Deputy-Chairman's words would necessarily be understood by the jury as a warning as to the necessity for particular care because there was no corroboration. There is not a word to be found in the summing-up of what this Court regards as a necessary direction to the jury in such a case. The jury should have been told that, before they could convict, they must first make up their minds that they were prepared to accept the complainant's evidence as reliable and that, having so made up their minds, they should look to see whether there was any corroboration of that evidence. The Court takes the view that the summing-up was unsatisfactory by reason of the absence of any such direction, and the well-established rule is that, where there has been an absence of any proper direction as to corroboration in a case such as the present and where there was in fact no corroboration, then the conviction must be quashed, unless the case is one of those exceptional ones in which the Court can say that the jury, if they had been properly directed, must inevitably have come to the same conclusion. It is quite impossible to say that in the present case, and the result is that the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitor: Solicitor to the Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

GEORGE ALBERT GILLINGHAM.

1939.
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Evidence—Articles Found on Prisoner—Charge of Unnatural Offences—Indecent Postcards—Sexual but not Homosexual Acts Depicted—Admissibility.

On the trial of a prisoner who was charged with attempted buggery and gross indecency with another male person certain indecent postcards found on him on arrest were admitted in evidence. These postcards contained drawings depicting exaggerated sexual, but not homosexual, acts. The Judge ruled that they were admissible, on the ground that they might be used by a person minded to commit the crimes charged as an adjunct to assist him in the commission thereof by inflaming the passions of the person with whom he intended to commit the crimes or rousing his own passions.

Held, that the ruling was correct in law and that the evidence was properly admitted.

Appeal against conviction.

The appellant was convicted at Poole Quarter Sessions on July 22, 1939, of attempted buggery and gross indecency with a male person and was sentenced by the Recorder to six months' imprisonment with hard labour.

When the appellant was arrested, a number of postcards were found on him. These postcards contained drawings of an extremely indecent character depicting exaggerated sexual acts, but not acts between male persons. It was objected by defending counsel at the trial that these postcards were inadmissible in evidence, but the Recorder decided to admit them and gave the following ruling: "Evidence of their possession is not admissible, in my opinion, merely to indicate the fact that [the appellant]

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had a dirty mind; but if I can properly come to the conclusion that they are the sort of things which might well be used by a person who is guilty of such an offence as this, as an adjunct, some assistance in the commission of that offence, then I think that, under the doctrine laid down by Darling, J., in the case of TWISS (13 Cr. App. R. 17; [1918] 2 K. B. 853), they would be admissible here. In my view, those are things which a man who was guilty of an offence like this might well have about him, and might well use as an adjunct to assist him in the commission of this crime. How? By using them to inflame the passions of the person with whom he intended or designed to commit this crime, or to rouse his own passions for such a purpose."

J. T. Molony, for the appellant:

There were certain defects in the summing-up with regard to the way in which reference was made to statements made by the appellant. The substantial ground of appeal, however, is that the indecent postcards found on the appellant were wrongly admitted in evidence. The Recorder ruled that they were admissible on the ground that they might be used as accessories to the crimes charged. The nature of the crimes charged, however, was wholly different from the subject-matter of the postcards. They could not be admissible on the authority of TWISS (*supra*) for the purpose of showing what the practice of the appellant was, for there was no nexus between the postcards and the crimes charged.

W. Maitland Walker, for the Crown, was not called on to argue.

CHARLES, J.: The appellant together with a man named Farr was convicted at Poole Quarter Sessions of attempted buggery and gross indecency and was sentenced to six months' imprisonment with hard labour. He appeals by leave of the Court against his conviction. The facts of the case are such that I need not deal with them in detail. The

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two men were found in a park in circumstances which would justify the conviction being affirmed unless there has been some wrongful admission of evidence or defect in the summing-up.

Two points are taken on behalf of the appellant. One is that there were defects in the summing-up. [His Lordship referred to the summing-up and continued:] The Court is unable to discover any defects. The summing-up was fair and adequate.

It is further complained that the Recorder wrongly admitted evidence consisting of certain postcards depicting sexual acts. It is said that, inasmuch as they were not postcards which would indicate that the appellant had homosexual tendencies, they should not have been admitted. It is to be observed that the Recorder considered this point with great care. [His Lordship then read the Recorder's ruling, which is set out above, and continued:] It appears to this Court that the Recorder when he gave his considered view on this point came to a perfectly correct conclusion in law and that the postcards were admissible for the reasons which he has indicated.

In the opinion of the Court, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors—Peacock and Goddard, agents for L. C. Marrow, Poole, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

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24 *October.*

VICTOR FRANK COCHRANE HERVEY.
WILLIAM GOODWIN.

Sentence—Conviction on Certain Counts Quashed—Appeal Against Conviction Only—Reduction of Sentence by Court Proprio Motu.

Reduction of sentence by the Court in a case where conviction on certain counts was quashed and on other counts affirmed, although the appellant had appealed against conviction only.

Appeal by the first appellant against conviction and sentence, and by the second appellant against conviction only.

The appellants were convicted at the Central Criminal Court on July 6, 1939, on the following four counts of an indictment: (count 1) of conspiracy to steal property of Mrs. Daubeny; (count 2) of housebreaking and larceny of the property of Mrs. Daubeny; (count 4) of conspiracy to steal the property of Mrs. Burley; (count 5) of larceny of the property of Mrs. Burley. They were sentenced by the Recorder, Hervey to three years' penal servitude and Goodwin to two years' imprisonment.

It is unnecessary to set out the facts of the case, which is reported on one point only.

F. Ashe Lincoln, for the appellant Hervey:

There was misdirection in the summing-up in that the Recorder directed the jury that certain matters could be

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regarded as corroboration of the evidence of an accomplice, when in fact they could not be so regarded. The appeal against sentence is not pursued.

St. John Hutchinson, K.C. (*D. W. Conroy*, with him), for the appellant Goodwin:

There was in fact no corroboration of the accomplice's evidence in the case of this appellant, and the Recorder was wrong in telling the jury that there were matters capable of being regarded as corroboration. Further, the Recorder failed to direct the jury that Goodwin had never been identified as having been in the place where Mrs. Burley's property was stolen, and also failed to direct them that they might find one prisoner Guilty and the other Not Guilty.

L. A. Byrne, for the Crown:

There was corroboration in the case of each appellant and the summing-up, regarded as a whole, was satisfactory.

THE LORD CHIEF JUSTICE [after referring to the facts:] In the opinion of the Court the summing-up of the Recorder with regard to the case of Hervey was adequate, correct and fair. He manifestly had in mind the judgment of this Court in BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658. In that case LORD READING, C.J., said (12 Cr. App. R., at p. 89; [1916] 2 K. B., at p. 665): "The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence?" He then proceeds to examine that

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question and expresses his conclusion as follows (12 Cr. App. R., at p. 91; [1916] 2 K. B., at p. 667): "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." That judgment has been referred to on more than one occasion, and the canon there laid down remains unimpaired. It was carefully and accurately applied in the present case. [His Lordship went on to say that in the opinion of the Court there were no grounds for interfering with the conviction of Hervey on any of the counts on which he was convicted.]

To pass to the case of the appellant Goodwin, Mr. Hutchinson has argued four grounds of criticism of the summing-up. He has argued that in the case of Goodwin there was no corroboration of the accomplice's evidence, and that the jury were wrongly directed that there was corroboration. He has also argued two minor points. If there was no corroboration as far as Goodwin was concerned, it would have been in a high degree prejudicial to direct the jury as if there had been. In one part of his summing-up the Recorder does seem to have fallen into the error of treating as corroboration matters which fail to satisfy the strict test, and of directing the jury that there was corroboration when there was not.

Goodwin has appealed against conviction only. It appears to us, however, that it is within the power of the Court to treat his notice of appeal as if it had included an appeal against sentence. We think that the conviction of Goodwin on counts 4 and 5 cannot be supported, and ought to be quashed, while his conviction on counts 1 and 2 remains. Notwithstanding the omission in the notice of appeal, the Court is of opinion that, in view of the partial

revision of the conviction, his sentence may suitably be reduced to one of eighteen months' imprisonment.

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One appeal dismissed.
One conviction quashed in part and sentence reduced.

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Solicitors—A. Kramer & Co., for appellant Hervey; Temple & Co., for appellant Goodwin.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHARLES AND MR. JUSTICE HILBERY.

RONALD DILLON.

1939.
27 *November.*

Murder—Defence of Insanity—Summing-up—Medical Evidence Not Accurately Referred to—Substitution of Verdict of Guilty but Insane.

Substitution of verdict of guilty but insane for a verdict of guilty of murder in a case where the summing-up had not accurately referred to the effect of the medical evidence.

Appeal against conviction.

The appellant was convicted at Liverpool Assizes on November 1, 1939, of the murder of a boy aged seven and was sentenced by Stable, J., to death.

The appellant, who was eighteen years of age, lived with his mother in a single room containing two beds in a house in Liverpool. At the trial the dead boy's father gave evidence that he had seen the boy in the street at 1 p.m. on September 16, and that afterwards he went to

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inquire for him at the house where the appellant and Mrs. Dillon lived and spoke to the appellant, who admitted that he had given the boy some cigarette cards and sent him home. The appellant's mother gave evidence that when she came home at about 4.30 p.m. she noticed a suit-case under one of the beds in the bedroom and asked the appellant if he was going away, to which he replied that he was not, but that he was putting some blankets away; and that at about 10 p.m., when she was going to bed, she noticed a bag protruding from under her bed and that when she went to remove it the appellant said: "Oh, Mum, I am sorry. I must have went mad." A police officer, who came to the house about 11 p.m., found under the bed a seaman's kitbag containing the naked body of the boy. He cautioned the appellant, who said: "All right, officer. I took him to the house to show him some cigarette cards and I lost my temper. I put my hands round his neck and squeezed him tight. I then stuck a knife in his throat and his chest. I took all his clothes off and put him in the bag, and tied him up and pushed him under the bed." The appellant later made a fuller statement to the same effect. A medical witness gave evidence that on a post-mortem examination of the body he found twenty wounds and eight bruises, that he formed the opinion that there had been an attack of extreme violence, and that death had been caused by wounds perforating the right lung and heart.

The appellant did not himself give evidence, but Dr. Rankin, a medical witness called for the defence, expressed his opinion that the appellant had committed the crime when suffering from affective epilepsy and that he was then labouring under such a defect of reasoning, emotion and feeling as not to know the nature and quality of the act he was doing, or that he was doing wrong.

The material passage from the summing-up is set out in the judgment of the Court.

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F. S. Trotter, for the appellant:

The Judge misdirected the jury as to the effect of Dr. Rankin's evidence. He appears to have told them that Dr. Rankin had expressed the opinion that a man who had had a violent outbreak of temper might not have known at the time of the act what he was doing or that he was doing wrong. But the doctor was presupposing the existence of a disease of the mind, namely, affective epilepsy. [He referred to the passage in the summing-up set out in the judgment.]

R. S. Nicklin, for the Crown:

The passage complained of does not appear to be entirely satisfactory, but it appears that the Judge was endeavouring to deal with different portions of the doctor's evidence, and that all he was telling the jury was that a mere outbreak of temper could not be the foundation for a defence of insanity.

THE LORD CHIEF JUSTICE [after stating the facts:] The Judge in his summing-up explained carefully and clearly that the burden of proof was on the prosecution. He explained the nature of the crime of murder, and went with particularity into the evidence. He then went on to deal with the defence of insanity. As far as that defence is concerned, it is not at this time possible to hold any view but one in a criminal Court. The law was clearly laid down in the opinions of the Judges in their answers to the questions submitted to them in MACNAUGHTON'S CASE (1843), 4 St. Tr. (N.S.) 847: "The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did

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know it, that he did not know he was doing what was wrong." One would have thought that those words were sufficiently clear and precise to prevent the introduction of any ambiguity, yet all sorts of conundrums from time to time arise. It is clear that the foundation of the whole matter must be defect of reason due to disease of the mind. Then there is a third matter to be proved, that in consequence of defect of reason due to disease of the mind the accused person did not know the nature and quality of the act he was doing, or, if he did know it, did not know he was doing what was wrong. It is not necessary that the accused person should fulfil both these conditions—the word is " or ", not " and ".

In the present case the Judge referred in terms to that state of the law, and if the matter had rested there it might be difficult to say more, but unfortunately in the course of his summing-up he permitted himself to use these words with reference to the evidence of Dr. Rankin: " Members of the jury, we are dealing with realities here, naturally. What Dr. Rankin in fact means by this affective epilepsy or equivalent epilepsy is this. He said that, in his view, excluding cases of homicidal mania or other cases of extreme mental disease, whenever a person gives way to a violent outbreak of temper and in consequence of that violent outbreak of temper commits some horribly violent attack either for no reason at all or for some reason utterly trivial in comparison with the nature of the attack, in all those cases the man who commits such an act at the moment of committing the attack does not know what he is doing and does not know that what he is doing is wrong. Members of the jury, we all know that when we lose our tempers we sometimes afterwards feel bitterly ashamed. But to come here and say: 'I lost my temper and because I lost my temper and did it I am not criminally responsible, because when people do things when they have lost their temper they do not really know what they are doing and

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they do not know it is wrong '—if that be right, members of the jury, it would be an answer to every criminal case." We have considered that passage with care. It seems to give the go-by to the whole topic of affective epilepsy, and seems to be dealing with a state of affairs which might arise or an opinion which might be formed merely in circumstances in which it appeared that somebody had lost his temper apart altogether from the fundamental question whether there was evidence to show that at the time of committing the act the accused person was labouring under affective epilepsy. In our view, this part of the summing-up does something less than justice to the evidence which Dr. Rankin had given on the meaning of affective epilepsy, applied to the appellant and his history.

In the circumstances we have come to the conclusion that the verdict was unsatisfactory and that, if the law in relation to the facts of the case had been accurately expounded to the jury, the jury would, no doubt, have returned a verdict that the appellant was guilty of the act charged against him, but was insane at the time when he did the act. In our own opinion, regard being had to the whole of the evidence, that was the right verdict and the verdict which would in other circumstances have been returned. Accordingly we order that the sentence of death be quashed, that the above special verdict be substituted, and that the appellant be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883.

Verdict substituted.
Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HALLETT.

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PETER BARNES.
JAMES RICHARDS.

Separate Trials—Discretion of Trial Judge—Necessary only where Essential Part of One Prisoner's Defence Attacks Co-Prisoner — Summing-up — Corroboration — Accomplice — Warning not Required where One Prisoner gives Evidence Implicating Co-Prisoner.

The question whether there should be separate trials of prisoners jointly indicted is one for the discretion of the Judge at the trial. Separate trials should be ordered where an essential part of one prisoner's defence amounts to an attack on a co-prisoner, but the mere fact that a prisoner, in the course of a statement excusing himself, has made observations which may have the effect of throwing blame on a co-prisoner is not a ground rendering it necessary that they should be separately tried.

BYWATERS (1923), 17 Cr. App. R. 66, explained.

Where prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case. The rule applies only to witnesses called for the prosecution.

MARTIN (1910), 5 Cr. App. R. 4, commented on and approved.

Appeals against conviction.

The appellants were convicted at Birmingham Assizes on December 14, 1939, of murder and were sentenced by Singleton, J., to death.

The case arose out of a bomb explosion in a street at Coventry, as a result of which five persons lost their lives.

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The appellants, together with three other persons, Joseph Hewitt, Brigid O'Hara and Mary Hewitt, were charged with the murder of one of the victims. The three other persons were acquitted. At the trial counsel for the appellants applied that they should be tried separately from the other three prisoners. The facts are set out fully in the judgment.

Albert Wood (*Douglas Jenkins* with him), for the appellants:

The Judge should have ordered that the appellants be tried separately from the other three persons indicted with them. They were embarrassed in their defence by being tried together with the two women prisoners. Each of the women had on arrest made statements which inculpated themselves to some extent, but prior to the trial they made further statements which inculpated both the appellants, especially Barnes, and these statements appeared on the depositions. The rule laid down by this Court in BYWATERS (1923), 17 Cr. App. R. 66, at p. 69, is that, where the defence of one co-prisoner incriminates another co-prisoner, that is a good ground for ordering separate trials. Further, the two women, when they came to give evidence on their own behalf, gave evidence which directly inculpated the appellants. They were, from the point of view of the prosecution, in the position of accomplices, and the Judge should have warned the jury that their evidence required corroboration.

[The Court intimated that they desired to hear counsel for the Crown on this last point only.]

Richard O'Sullivan, K.C. (*Arthur Ward* with him), for the Crown:

Even where there should have been a warning on the danger of convicting on the uncorroborated evidence of an accomplice, the practice of the Court has been not to quash the conviction if it has been satisfied that there was in fact sufficient corroboration, and in the present case the corroboration was abundant. [He referred to TATE, 1 Cr.

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App. R. 39; [1908] 2 K. B. 680, and LEWIS (1937), 26 Cr. App. R. 110.] In the present case, however, the question of corroboration did not arise at all, because the jury found that the two women were not accomplices of the appellants. Further, the necessity for a warning on the question of corroboration arises only where the evidence which is required to be corroborated has been given for the prosecution. A co-prisoner who gives evidence implicating another co-prisoner is not put into the position of an accomplice. [He referred to MARTIN (1910), 5 Cr. App. R. 4.]

Albert Wood, in reply, referred to DEAN (1924), 18 Cr. App. R. 21.

THE LORD CHIEF JUSTICE: These two appellants, Peter Barnes and James Richards, were convicted at the Birmingham Assizes in December, 1939, of murder. They now appeal against conviction. The appellants were both defended by counsel under the provisions of the Poor Prisoners' Defence Act, 1930. They were indicted for the murder of one Elsie Ansell, and there were three other persons indicted with them, namely, Joseph Hewitt, Brigid O'Hara and Mary Hewitt. Those three persons were acquitted.

The appellants appeal upon various grounds, which have been carefully and fully explored by counsel who has appeared on their behalf. I shall refer in a moment to what is left of those grounds of appeal after the very careful and frank argument of Mr. Wood.

It may be convenient in the first place shortly to recapitulate the story of this case. The case for the prosecution was that the two appellants, Barnes and Richards, together with other persons, were concerned in the preparation, placing and explosion of a bomb which was left on a carrier cycle outside a shop in the middle of Coventry about 2.30 p.m. on Friday, August 25, 1939. In consequence of that explosion no fewer than five persons were

killed, and among those persons was Elsie Ansell, for whose murder the prisoners were indicted. Apart from the killing, many persons were injured and a considerable amount of damage was done. The violence of the explosion was indicated by many facts, as, for example, the fact that parts of the carrier cycle were discovered at a distance of 300 yards from the scene of the explosion, parts were found on the spot, and other pieces were extracted from the bodies of those who were killed.

It appears that Joseph Hewitt came to live in Coventry in 1935. He lived there with his wife, Mary Hewitt, and a child, and his mother-in-law, Mrs. Brigid O'Hara, in a street called Meadow Street. Early in June, 1939, the appellant Richards, who was a plasterer's labourer, came to England. He went to lodge with the Hewitts, and shortly afterwards they all moved to 25, Clara Street. Richards was unemployed, but was able to pay Joseph Hewitt 23s. 0d. a week for his board and lodging; and he and various other persons were seen from time to time carrying earth from the house into the garden, and apparently mixing cement for the cementing of a pit. A pit 2 feet deep, 18 inches wide, and 22 inches long, was afterwards discovered under the stairs of Joseph Hewitt's house. The appellant Barnes came to England about the end of July. He also was unemployed, but somehow he was able to make journeys from London to Liverpool, to Glasgow, and to Coventry on more than one occasion.

On Monday, August 21, Barnes visited the Hewitts, and also upon that day Mrs. Hewitt bought two flour sacks from a shop, and for some reason or other requested a receipt for the sum of 2s. 0d. which she paid. Not long afterwards, within half an hour or so, Mrs. O'Hara, Mrs. Hewitt's mother, brought those flour sacks back and requested pure white ones; and it is made plain by the evidence that those fine sacks were needed for the purpose of holding potassium chlorate, an explosive which happens

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to be a fine powder. On the same day, Mrs. O'Hara purchased for some reason a suitcase for 7s. 6d., for which also for some reason she obtained a receipt, and she asked if she might return the case in the event of its proving unsuitable. On the following day a man went to a cycle shop in Coventry and bought a new carrier cycle. There was evidence identifying that man as the appellant Barnes. The man paid a deposit of £5, and gave the name of Norman. He also gave an address which proved to be false, and he also for some reason was careful to take a receipt.

Two days later, on Thursday, August 24, Barnes arrived at 25 Clara Street with a suitcase, and it would appear that the same evening he went back to London. The evidence showed that on that night a bomb, controlled by means of a clock, was made at the house at Clara Street and loaded with gelignite and potassium chlorate. On the following day, Friday, August 25, Joseph Hewitt went to work apparently as usual, and remained at his work. His wife Mary Hewitt also went to the place where she was employed, but she returned home at midday. At noon on that day the appellant Richards went to the cycle shop, taking with him the receipt for the sum of £5, paid the balance of 19s. 6d., and then took the carrier cycle to Clara Street. Shortly afterwards some man, not one of the prisoners, rode that bicycle down to Broadgate, a street in the business heart of Coventry, and situated at a distance of about a mile and a half from Clara Street. It was seen in Broadgate about 1.30 p.m., and it was seen standing at 2.15 p.m. by the kerb outside the shop of a Mr. Astley. Shortly afterwards, namely at 2.30 p.m., a violent explosion occurred. At some time between 2.30 and 3 p.m. in the afternoon a neighbour saw Richards shaving, and told him about the explosion. On that same night, police officers visited Barnes's lodgings in London and there found, among other things, three packets of scented potassium chlorate. When

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Barnes came in shortly before 9 p.m., he told the officers that those packets were shampoo powder. He had a document in his pocket signed "Dixon", which bore the date August 24, 1939, and the envelope was marked "For Jim Kelly". Barnes said that it was a letter which he had written to a friend, and that letter among other things contained these words: "I am sure you are wondering why I did not write, but I no (*sic*) you will understand how things are. I am here in London, I am very lookey (*sic*) so far, T. G."—it is said that means "Thank God".—"I got it very hard after coming over. I did not meet the man I was to meet. He was gone, so I had to go to Liverpool the next day and I did not meet anyone there, so I was a week and did not meet one. I was nearly mad, so then I met one and he told me all was gone but himself, so I had to fix things up for myself. We got over a few then and got things fixed up. What I am on, I go from one place to the other and bring the S"—it is suggested that that means "the stuff"—"Believe me, it is hard, but I got away well so far." Then follow these words: "I am after coming back from Coventry tonight 11.30, so by the time you get this the paper should have some news." The police officer told Barnes that he had reason to suspect that he was concerned in the Coventry explosion, and the answer of Barnes was that he had been in Coventry, but that coincidence could happen.

On Monday, August 28, the receipts for the money paid for the two flour sacks and the suitcase were found in London in the possession of a young woman, Sarah Keane, who is said to be engaged to be married to the appellant Barnes, and it was on that day that the police, visiting Clara Street, found the pit to which reference has been made. They also found the suitcase and some strips of copper sheeting which, according to the evidence, might be useful in the making of a bomb. They found also some tools and soldering material and two "setters", as they are termed, that is to

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say, the knobs controlling the hands of the alarm of an alarm clock. Those things, it was said in the evidence, would be removed and other things attached if the clock should be used as part of a time bomb, and one of those setters was found with the tools. The other was found in the pocket of Richards, who said that the baby had been playing with it, and he supposed he had picked it up. There was no clock in the house which the setter fitted.

Richards made a statement of considerable length, and in the course of it said that he had come over to Coventry on August 13 to look for work and for lodgings, and had happened to ask Joseph Hewitt where he could get lodgings, but he made no mention of Barnes. He said that on August 25 he did not get up till 1 p.m., and was shaving when he was told of the explosion. Afterwards, he said that he knew nothing about any of the things found on the premises, and on the following day, when the pit was found, he said that he had never seen it before and that there had been no cementing done while he was there.

On Tuesday, August 29, the police again searched 25 Clara Street. They found that some tiles in the cupboard under the stairs had been newly cemented. They had them removed. They found they were mounted on a concrete slab covering a cemented pit 2 feet by 18 inches by 22 inches. The tiles had been replaced three or four days earlier, and the concrete slab had been made in the back yard. Hewitt asserted that he had never seen the pit before, and, on being told that he and Richards had been seen mixing cement and making slabs, said there had been no cementing since they had come to the house. Richards also denied having done any cementing. In the garden, however, there was a bag containing dry cement, and there were signs of recent digging near the coal-house door. Afterwards, Joseph Hewitt and Richards were charged with possessing an explosive, potassium chlorate, to which Richards observed: "You did not find any potassium chlorate on me." After-

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wards, Brigid O'Hara asked to see the inspector, and said she was going to tell the truth. Mary Hewitt also asked to see him, and they made statements. On September 27 they were all charged with murder.

It is not necessary to recapitulate in detail the evidence that was given, but it may be well to mention the evidence of Mr. Dupre, who was at that time Chemical Adviser to the Explosives Department of the Home Office. According to his evidence, the envelopes found in Barnes's lodgings contained a mixture of potassium chlorate, sodium bi-carbonate and also some scent. According to him, the mixture was neither bath salts nor hair wash, nor was it tooth powder. He said that a suit of dungarees, a raincoat and a hat, found in Barnes's room, bore traces of potassium chlorate. He described the method of construction of a bomb, and his evidence was that all the necessary tools for the construction of a bomb were to be found in the cupboard at Clara Street, and that practically every tool there would be used in the process. He said that the setting knobs might well be removed from an alarm clock in making a bomb, and he described potassium chlorate as a fine powder which penetrates coarse material. Mixed with wax it is a powerful explosive, but it must be detonated.

The appellant Barnes, in giving evidence, said that he came over to England from Ireland at the beginning of August with the sum of £13, which he had saved, and hoped to get work so that he could marry Miss Keane. He took lodgings in Westbourne Terrace, London, but was not successful in his search for work. He said that he bought three packets for one shilling from a girl in the street, who told him that they really cost three shillings, and were shampoo powder and tooth paste, tooth powder and bath salts. When, however, Miss Keane saw them she told him, according to him, that they were no good except to put in a drawer to scent his clothes. He went on to say that one day, while listening to somebody speaking in Hyde Park,

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he chanced to meet an acquaintance named MacMahon, whom he had known some years before in Dublin. They met again a few days later and MacMahon told him that he knew a man named Norman, who lived in Coventry and could give him work. Norman, as it happened, was the name used, with a false address, as the purchaser of the bicycle. MacMahon, according to the evidence, told him that Norman lived at 25 Clara Street, Coventry, and, as they were parting, MacMahon asked for the loan of a suitcase, so he went and fetched his and lent it to MacMahon, who gave him 10s. to buy another one to exchange for it when they met. Barnes added that on Monday, August 21, he went to Clara Street and found Richards, who had never heard of Norman, but asked him in for a cup of tea. He then asked Mrs. O'Hara to get him a 24-inch suitcase, and handed her 10s. She brought him back the case and his change and receipt. He said he spent the night of the 21st at Warwick Avenue, where Miss Keane lived, and remained the whole of the 22nd in London, meeting her for lunch at midday and again at teatime, and was with her all the evening, and spent the night at Warwick Avenue. Barnes went on to say that, when he saw MacMahon on Thursday, he explained what had happened and exchanged suitcases with him. He said he got to Coventry about half past six, and went to Clara Street, where Richards told him somebody was making a fool of him, and when he got back he met MacMahon, as arranged, outside Euston Station. He said MacMahon wrote a letter of five or six pages of his notebook and handed it to him to copy out on notepaper for delivery at a Dublin address to a man named Jim Kelly. He said he copied it out on Friday evening on paper provided by Miss Keane, and that was the letter which was in his pocket when he was arrested that night. He denied that he had ever had any potassium chlorate. He said that he had nothing to do with the I.R.A., and in the course of his evidence added that Westbourne Terrace was about 600 yards

from Warwick Avenue, but he thought it handier to carry his suitcase for half an hour's walk each way in Coventry, rather than pick it up on his return. He denied that he had asked Mrs. O'Hara to get him some white calico bags, or that he ever heard them mentioned.

He was followed by the appellant Richards. Richards said that Barnes was not with him when he ordered the bicycle, and that, when Barnes came down on the Thursday, his suitcase was not opened. He said he himself came to Coventry at the end of May and got a chance recommendation to Hewitt for lodgings. He denied telling Mrs. Hewitt he was an operating man from Dublin. Then he said that on the Tuesday he and another man, not Barnes, went to the bicycle shop and he stood outside while the other man made the purchase and ordered him to collect it on the Friday, which he did. Richards went on to say that on the Thursday another man brought a bomb to Clara Street and fitted it together next day. Then when the appellant had fetched the bicycle, the other man took the bomb away on it, saying he would come back for the tools another day. Richards added that he did not know when or where the bomb was intended to go off, and he would not have been a willing party to its explosion in Broadgate in the middle of the day, because it was part of the instructions of the I.R.A., of which he was a member, that life was not to be endangered. He said that his job was to keep the powder and distribute it to anyone who called. He started to dig the pit in August, but Hewitt objected, and it was never used. Then he added that he knew the powder was for making bombs, and when the third man came with a clock and batteries he gave him what he had. When Mrs. O'Hara showed him the paper, he said that the bomb must have gone off very quickly, because he thought it was intended to explode at night, but he did not know where.

Then followed the prisoner Joseph Hewitt, who said that

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he had nothing to do with the bomb. He made the slab before the explosion and covered up the pit.

Mrs. O'Hara gave evidence that Barnes came twice, on Monday and Thursday night, and that she bought the suitcase for him on Monday, the 21st; and that on the Friday morning, about 9.30 a.m., Richards admitted a young man with a parcel, and went to fetch the bicycle soon after twelve, saying she would know later what he wanted with the bicycle. Then she went on to speak of the explosion. She was followed by Mary Hewitt, who said that she only saw Barnes once, but another man, a stranger, came on Wednesday, she thought. She said Barnes was not present when Richards sent her out for the flour bags, but was there when she brought them back. She gave the receipt and the change to Richards.

Such, in part at least, was the evidence at the trial, and before the Judge came to sum up, no fewer than three learned counsel made addresses on behalf of the accused persons. The summing up was one of considerable length, and it is to be observed that in it, from first to last, neither the word "accomplice" nor the word "corroboration" is to be found. It was made clear in the course of the argument that there was a similar state of affairs in the speeches made at the trial. It is common ground that the speeches made by the three counsel who appeared for the various prisoners never referred to the topic of corroboration or the topic of accomplice. That seems to us to be an interesting fact and not without significance in this case, because, of the two grounds of appeal which have been urged, one is the contention that the Judge failed to direct the jury that the evidence of the two women jointly charged with the male appellants required corroboration.

The first ground of appeal which was developed by Mr. Wood in his very careful argument on behalf of the appellants was that, in the circumstances of this case, there ought to have been, and there was not, a separate trial of

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the two appellants. His argument was that the statements which had been made by the women, who afterwards came to be in the dock, were statements which had the effect of inculpating one, at least, of the appellants, and in view of that fact it is argued that there was a duty upon the Judge to order separate trials.

With regard to the law upon that point, there is no longer any room for doubt or difference. The question whether there should be separate trials is a question for the discretion of the Judge. The Judge exercised his discretion in this case; he heard argument, and he acted after the argument had been heard. In our view, there is no ground here for the contention that it was necessary for the administration of justice that the trials should be separated.

Much stress was laid by Mr. Wood upon a passage in a case in this Court, BYWATERS (1923), 17 Cr. App. R. 66, at p. 69, in which it was said that where the defence of one prisoner incriminates another prisoner there ought to be separate trials, but, if that passage is carefully read, it is quite obvious that what is meant is that where it appears that the essential part, or an essential part, of one prisoner's defence is, or amounts to, an attack upon another prisoner, then a separate trial should take place. In our opinion, it is idle to contend in this case that it was of the essence of the evidence, or the statements, of the two Hewitts, or of Mrs. O'Hara, to attack either of the appellants. It is quite obvious, when one reads that evidence and those statements, that what those witnesses were concerned with was to excuse themselves, not to attack others. The mere fact that in the course of excusing themselves they made observations which might have the effect of throwing blame upon others who were in the dock is no sufficient reason why the trials should have been separated. Apparently, the contention is that the Judge, exercising a kind of prophetic power, is to perceive in advance that the effect of the evidence, if given by one prisoner, may inculpate another, and that in all cases where

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that may happen, it is the duty of the Judge to order a separate trial. That is not a correct statement of the position, and, in our opinion, there was no sufficient reason in this case for ordering separate trials, and there is no ground for the contention that this conviction cannot be supported for the reason that separate trials were not had.

The rest of the grounds of appeal, numerous as they are, are really reducible, as appeared in the course of the very careful argument of Mr. Wood, to two classes only. Those grounds which relate to mere errors of fact or mere misstatements are immaterial. There is also the ground which has been developed in the course of the argument at some length, that there ought in this case to have been a direction to the jury that the evidence of Mary Hewitt and Brigid O'Hara required corroboration. That is really the main point of Mr. Wood's argument. It is interesting to observe that nobody at the trial took any such point. It appears to be an afterthought, following a study of what took place at assizes. If it were sound, of course, the mere fact that it was an afterthought would be immaterial, but one cannot help thinking that there is some confusion of thought in the contention that in this case it was the duty of the Judge to direct the jury that here they were dealing with the evidence of accomplices, and that that evidence must not be accepted in the absence of corroboration.

The witnesses whose evidence it is said needed corroboration are Mrs. Hewitt and Mrs. O'Hara. They were not called as witnesses for the prosecution. They went into the witness-box to give evidence, and they gave evidence, on their own behalf, and the rule with regard to corroboration of accomplices does not seem to apply to such a case. As was stated in BASKERVILLE, 12 Cr. App. R. 81, at p. 89; [1916] 2 K. B. 658, at p. 665: "The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required

is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it." In no respect is it true to say that the evidence, which is referred to in this part of the notice of appeal, was evidence called by the prosecution nor was the jury being asked by the prosecution to act upon the evidence given by either of those two women. One looks in vain for any case in which it has been decided that, where prisoners are tried together on the charge of being jointly concerned in the commission of a crime and they elect to give evidence, and in so doing one of them happens incidentally to give a piece of evidence which tells against another of the persons accused, it is requisite that the warning with regard to the evidence of accomplices should be given.

Our attention was directed this morning to a case which seems to throw useful light upon this part of Mr. Wood's argument, MARTIN (1910), 5 Cr. App. R. 4, at p. 6, where Lord Alverstone, C.J., delivering the judgment of this Court, said: "This is one of those cases where it is very difficult to apply the rule about accomplices. If Johnson's story was true he was not an accomplice, and if Martin's story was true, he was not an accomplice. . . . But Johnson made a statement which implicated Martin to a certain extent, which Martin did not contradict; he merely said he wished to reserve his evidence. The case was essentially one for the jury, and there was no want of direction which could have led to any miscarriage of justice."

In the opinion of this Court, on the facts of this case, and upon the evidence in this case, the necessity for a warning with regard to the evidence of accomplices did not arise. Even if it had arisen, it is manifest that there was ample and cogent evidence which made it clear what the verdict ought to be. There was ample evidence, apart from that evidence which is said wrongly, as it appears to us, to have required corroboration. The summing-up of the

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learned Judge was careful, systematic and full, and in our opinion there is no ground for the contention that in any of the respects referred to in the grounds of appeal the summing-up was defective.

In our view, there is no ground at all for the appeals which have been urged, and they are dismissed.

Appeals dismissed.

Solicitor: W. J. Mealand, Coventry, for appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HALLETT.

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Additional Evidence—Leave of Judge—Witness Called by Crown After Defence Closed—Handwriting Expert—Specimens of Prisoner's Handwriting Held by Prosecution from Outset—No Matter Arising ex improviso *— Necessity for such Evidence Obvious—Admissibility.*

After the defence of a prisoner charged with forgery and obtaining money by a forged instrument had been closed, the Judge adjourned the case and allowed the prosecution to call a handwriting expert. Specimens of the prisoner's admitted handwriting had been in the possession of the prosecution from the beginning of the proceedings. Apart from this additional evidence, the case for the prosecution rested on the uncorroborated testimony of an accomplice.

Held, that as the additional evidence did not relate to something which had arisen *ex improviso* in the course of the trial, but was evidence, the necessity for which should have been obvious from the outset, it should not have been admitted at that stage of the trial; and, as it was impossible to say that the jury must inevitably have convicted apart

from the additional evidence, the conviction must be quashed.

HARRIS, 20 Cr. App. R. 86; [1927] 2 K. B. 587; LIDDLE (1928), 21 Cr. App. R. 3; and MCMAHON (1933), 24 Cr. App. R. 95, followed.

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Appeal against conviction (on certificate).

The appellant was convicted at Hampshire Assizes on December 4, 1939, of forgery and of obtaining money by means of a forged cheque and was sentenced by Croom-Johnson, J., to eighteen months' imprisonment with hard labour.

The following statement of facts is taken, in substance, from the judgment:

The case made by the prosecution depended entirely on the evidence of a witness named Miss Dixon, who had previously admitted stealing the cheque form which had been used and was said to be forged, and who was, therefore, an accomplice. Two letter-cards were produced in the course of the case for the prosecution, which were stated by a police officer to have been received by him from the appellant. The writing on these cards was thereafter treated as admittedly the genuine writing of the appellant. Those cards had been written by the appellant and received by the police officer before the appellant was charged, and therefore had been in the hands of the prosecution since the beginning of the proceedings.

The case for the prosecution, when it was closed, depended on the evidence of the accomplice Dixon. Counsel for the defence submitted to the Judge that there was no corroboration of that evidence such as would be required if the rule of practice authoritatively stated in BASKERVILLE, 12 Cr. App. R. 81; [1916] 2 K. B. 658, was complied with. Counsel for the prosecution answered that the only evidence by way of corroboration on which he could rely was that to be found in the admittedly genuine handwriting of the appellant on the two letter-cards, and he suggested that

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the jury should be invited, without any positive evidence from any expert to assist them, to exercise their own judgment and decide whether the writing on the cheque was that of the appellant. The Judge ruled that the jury could not be asked to do that without some assistance by way of expert evidence, but decided that the mere lack of corroboration was not a sufficient ground for the withdrawal of the case from the jury and intimated that he would give them the requisite warning, following the law laid down in BASKERVILLE (*supra*).

Counsel for the defence then called the appellant as his only witness. His evidence was a complete denial that he had written or signed the cheque. The case was closed at midday on Saturday, December 2, 1939, and the Judge then adjourned the hearing till the following Monday morning, and said: "In the meantime the prosecution can consider whether they will or will not make an application for leave to tender further evidence, always remembering that, before such an application can be made, notice of any proposed additional evidence must be served on the defence." Turning to the jury, the Judge said: "I think it is better that we should have this case properly investigated."

On the Monday morning the prosecution asked permission of the Court to call additional evidence. The evidence was that of a handwriting expert to state that there were similarities between the admittedly genuine handwriting of the appellant and the handwriting in the signature on the cheque. Objection was taken by counsel for the defence as follows: "This is a case in which both the prosecution and the defence have closed their case, and nothing has arisen *ex improviso* which could justify the calling of fresh evidence." The Judge overruled that objection and admitted the evidence.

The Judge granted a certificate, under section 3 (b) of the Criminal Appeal Act, 1907, that the case was one fit for appeal on the question whether there was material on

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which he could exercise his discretion to permit the prosecution to call additional evidence, and generally on the case.

W. St. J. C. Tayleur, for the appellant:

The additional evidence should not have been admitted. Nothing had arisen *ex improviso* in the course of the defence. The nature of the defence had been clear throughout, and the appellant, when he gave evidence, did no more than deny on oath that he was the person concerned. The prosecution had had in their possession specimens of his handwriting a considerable time before the case began, and they had had ample opportunity of calling an expert witness. [He referred to HARRIS, 20 Cr. App. R. 86, at p. 89; [1927] 2 K. B. 587, at p. 590; LIDDLE (1928), 21 Cr. App. R. 3; and MCMAHON (1933), 24 Cr. App. R. 95.]

P. H. Thorold Rogers (for *Cyril Harvey*, on war service), for the Crown:

The cases referred to on behalf of the appellant were all cases where the Judge himself called the witness *proprio motu*, and cases in which the very fact that the witness was called was likely to prejudice the prisoner beyond the actual weight of the witness's evidence. In CRIPPEN, 5 Cr. App. R. 255; [1911] 1 K. B. 149, the prosecution were allowed to call evidence, after the case for the defence had been concluded, on a matter which did not arise *ex improviso*. The evidence admitted in the present case cannot be regarded as rebutting evidence in the strict sense of that term, but it was within the discretion of the Judge to allow the evidence to be called, even though it could have been called earlier.

HILBERY, J. [after stating the facts]: The Court is of opinion that the law is now well settled. The rule was laid down by Chief Justice Tindal in FROST (1839), 4 St. Tr. (N.S.) 86, at p. 386; 9 C. & P. 129, at p. 159, where the Chief Justice said: "There is no doubt that the general rule is that where the Crown

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begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." The rule thus stated was expressly adopted by this Court in HARRIS, 20 Cr. App. R. 86, at p. 89; [1927] 2 K. B. 587, at p. 594, where, after quoting the above passage, the present Lord Chief Justice said: "That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the Judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue." When Mr. Rogers, in his argument at the trial, submitted that the rule on which Mr. Tayleur relied was confined to cases where a witness was called by the Judge, he was met by the answer that the rule in terms applies to witnesses called on behalf of the Crown as well as to witnesses called by the Judge.

Since that time that case has been followed, and its principle applied, twice. In MCMAHON (1933), 24 Cr. App. R. 95, at p. 97, the passage in HARRIS (*supra*) was cited by the present Lord Chief Justice, who added: "Now in our opinion those conditions were not fulfilled with regard to these witnesses and it follows that the evidence of these six witnesses was, in our view, wrongly admitted." If those words are applied to the case now under consideration, it becomes manifest that here, too,

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those conditions were not fulfilled. In the first place, the burden had from the outset been on the prosecution to show that the handwriting on what was alleged to be a forged cheque was the handwriting of the appellant. The issue on which the evidence was required was no new issue which had arisen in the course of the trial. It was the original issue with regard to which the burden of proof rested on the prosecution. Furthermore, the evidence subsequently given was evidence to afford a comparison between the handwriting on the instrument alleged to have been forged and the handwriting on the two letter-cards which had been accepted as genuine examples of the appellant's real handwriting. The evidence required, therefore, was evidence to deal with material which had been in the possession of the prosecution since the beginning of the proceedings and it was evidence the necessity for which was obvious from the start. Indeed the Judge had no hesitation in saying that, without that evidence, it was not possible to ask the jury to act as handwriting experts themselves and return a verdict.

It cannot be said, in those circumstances, that the evidence of the handwriting expert was evidence on any matter which arose *ex improviso*. Nor can it be said that it was evidence the necessity for which no human ingenuity could foresee. It was evidence the necessity for which was obvious. It is true that, if a question arises in the course of a trial as to the proper time at which evidence should be received, the Judge may be called on to decide that question and in so doing to exercise a judicial discretion. This was not a case of that kind. This was a case where what was being done was to ask for the remedying of an obvious defect in the evidence called in support of the case for the prosecution, not only after the prosecution had been closed, but also after the evidence for the defence had been heard. It was an endeavour to call that supplementary evidence although

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the material on which it was to be given had been in the hands of the prosecution from the beginning and although the evidence related to a branch of the case for the prosecution on which the prosecution must have realised that positive evidence ought to be given.

There is, in addition, the unfortunate feature in this case that, in the view of the Judge, unless that evidence had been admitted, there was no evidence to corroborate the evidence of the accomplice which had been given for the prosecution. It is obvious from the course of the trial that the evidence of that accomplice was not such as the jury could reasonably be expected to accept if it stood alone. Without the further evidence, which we hold to have been wrongly admitted, it seems probable that the jury would have acquitted.

That is sufficient to dispose of this case, but how unfortunate it would be if such a practice were to be allowed to grow is well instanced and expounded by the present Lord Chief Justice in LIDDLE, where he said ((1928), 21 Cr. App. R. 3, at p. 13): "Nothing had suddenly emerged with required the calling of witnesses, and the circumstances in which the witnesses were called were such as gravely to imperil the defence and to put the defence to an unfair disadvantage." In the present case the additional evidence probably destroyed a defence which would otherwise have succeeded. The Lord Chief Justice continued: "If the same reasoning were to apply, it would have been perfectly open for the defendant, on the second of these adjourned hearings, to require a further adjournment in order that he might call, in his turn, rebutting evidence, and so the inquiry might wander on indefinitely." It would have been open to counsel for the defence in the present case to ask for a further adjournment so that he might have the opportunity of consulting and perhaps calling a handwriting expert. The eventuality of experts differing is not unheard of, "and so the inquiry might wander on indefinitely"

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In our view the necessary conditions which should have been fulfilled before this evidence was admitted were not fulfilled, and it is impossible to say that, if the evidence had not been admitted, the verdict would have been the same. The appeal must, therefore, be allowed and the conviction quashed.

Conviction quashed.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE HUMPHREYS AND MR. JUSTICE WROTTESLEY.

WILLIAM JOHN SURGENOR.

1940.
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Child—Whether Evidence to be Given Sworn or Unsworn—Duty of Presiding Judge to Investigate—Children and Young Persons Act, 1933 (23 *Geo.* 5, *c.* 12), *s.* 38 (1).

Where a child of tender years appears as a witness, it is the duty of the presiding Judge to satisfy himself whether the witness should be sworn or not, and he ought not to accept the decision of the committing justices without any further investigation.

Appeal against conviction.

The appellant was convicted at Tenterden Quarter Sessions on December 16, 1939, of shopbreaking and larceny, and was sentenced by the Recorder to fifteen months' imprisonment.

From a café at Tonbridge property, including a number of foreign copper coins and a handkerchief which had been left in a handbag of a woman assistant, had been stolen. Blood was found on the steps of the café, and on the following day the appellant was found to be suffering from injuries. Several of the copper coins were found at his

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lodgings, and the handkerchief, which was subsequently identified by the woman assistant, was found in his possession. Among other witnesses the prosecution called a girl aged nine. On being informed that the committing justices had refused to allow her to be sworn, the Recorder decided, without making any further investigation, that she should give her evidence unsworn. She stated that at the material time she had seen the appellant putting a foreign coin into a gas-meter, and that she subsequently recognised it when it was taken out of the meter. The appellant, in his evidence, denied that he had ever to his knowledge been in possession of any foreign coins.

D. Knight Dix, for the appellant:

After deciding that the girl should give her evidence without being sworn, the Recorder omitted to warn the jury that under section 38 of the Children and Young Persons Act, 1933 (*a*) corroboration was necessary. Further, it was the duty of the Recorder to investigate for himself whether the witness was capable of being sworn and to satisfy himself that the provisions of the section were satisfied. [She referred to SOUTHERN (1930), 22 Cr. App. R. 6, at p. 13; and LYONS (1921), 15 Cr. App. R. 144, at p. 145.]

John Thompson, for the Crown, was not called on to argue.

HUMPHREYS, J.: The appellant was convicted at Tenterden Quarter Sessions of housebreaking and larceny, and applied for leave to appeal against conviction. In his

(*a*) By the Children and Young Persons Act, 1933, s. 38 (1): "Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. . . ."

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notice of appeal he took no such point as has been argued to-day, and such points as he did mention were thought by this Court to be of no importance. It was observed by the Court itself that there had been an irregularity in the trial and the Court gave the appellant leave to appeal in order that the matter might be argued and that the Court might decide whether the irregularity was one which invalidated the conviction.

There was clearly a very substantial case against the appellant. [His Lordship referred to the evidence, and continued:] As the prosecution thought it desirable to strengthen their case with regard to the foreign coins, a little girl of nine was called as a witness. She said that about the material time she had noticed that the appellant was in possession of foreign coins and had seen him put into a gas-meter a coin which was not an English coin, and that later, when the gas men took the coin out, she recognised it. The coin was subsequently given to the child's mother, and eventually was produced. The child, who was evidently very intelligent, was cross-examined, and when her evidence was tested, it appeared quite clearly that she was right.

When the child went into the witness-box, the Recorder was informed that the committing justices had refused to allow her to be sworn. Instead of making an investigation himself, as he should have done, the Recorder accepted that statement and said that the child should give evidence without being sworn. On more than one occasion this Court has intimated that it is the duty of the presiding Judge to satisfy himself whether a child of tender age is or is not capable of being sworn. In this case no such proceeding took place. The Recorder elected to abide by the justices' view. That was wrong, and must not occur again. Those who preside over criminal trials must remember that it is the duty of the presiding Judge to make the investigation for himself.

It is perfectly obvious that no harm has been done to

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the appellant by the irregularity which occurred. The child appeared to the Recorder to be a thoroughly intelligent child, and she might have been, and ought to have been, sworn. The jury evidently accepted her evidence, and if they accepted it when she was unsworn, it is not likely that they would have rejected it if she had been sworn.

Further, perhaps because the child did not give evidence of importance, but was only a makeweight to prove what the police and her mother had already proved, the jury were not reminded of the statutory provision with regard to corroboration of the evidence of children of tender years. There has, therefore, in this respect also been an irregularity of the kind referred to by anticipation in SOUTHERN (1930), 22 Cr. App. R. 6, at p. 11, where Talbot, J., in giving the judgment of the Court, said: "It is too much to say, especially in view of the decisions of this Court in MURRAY (1913), 9 Cr. App. R. 248, and SCHIFF (1920), 15 Cr. App. R. 63, that it is a rule of law that if, in a case where unsworn evidence has been adduced, the Judge does not call the jury's attention to the provisions of the statute, that necessarily invalidates the conviction." This Court agrees with and follows that statement of the law. There may be cases in which the Court would quash the conviction in those circumstances. This is not such a case. The Court is quite satisfied that there has been no miscarriage of justice and that there has been nothing more than irregularity. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitor—E. W. G. Weale, Prosecuting Solicitor for Kent, for the Crown.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE HUMPHREYS AND MR. JUSTICE TUCKER.

TERENCE CRONIN.

1940.
26 *February*,

Quarter Sessions—Recorder—Deputy—Appointment of Person not a Barrister — Proceedings Void ab Initio — Order in Nature of Venire de Novo — Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 166 (1).

By section 166 (1) of the Municipal Corporations Act, 1882 : " The recorder [of a borough] may, in case of sickness or unavoidable absence, appoint, by writing signed by him, a barrister of five years' standing to act as deputy recorder at the quarter sessions then next ensuing or then being held, and not longer or otherwise."

The appellant was convicted at a borough quarter sessions presided over by a person appointed to act as deputy recorder by writing under the hand of the recorder, who was unavoidably absent. The person appointed to act as deputy was not, and never had been, a barrister.

Held, that the proceedings were void *ab initio*, that the conviction which had been recorded should be set aside and annulled, and that the appellant should be ordered to appear at the next quarter sessions to answer the indictment against him.

CRANE *v.* PUBLIC PROSECUTIONS (DIRECTOR), 15 Cr. App. R. 183; [1921] 2 A. C. 299, followed.

Appeal against conviction.

The appellant was convicted at Bury St. Edmunds Borough Quarter Sessions, on January 29, 1940, of dangerous driving and sentenced by the Deputy Recorder to nine months' imprisonment with disqualification for five years from holding a driving licence.

The Recorder of Bury St. Edmunds had been unable to appear at the sessions, having been unavoidably detained by extremely severe weather. Accordingly, in writing under his own hand, he appointed as his deputy Sir Francis

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Dunnell, the chairman of the West Suffolk Quarter Sessions. That course was assented to by all parties. In fact, Sir Francis Dunnell was a solicitor, and was not, and never had been, a barrister, and accordingly was not eligible for appointment as a deputy recorder under section 166 (1) of the Municipal Corporations Act, 1882.

The appellant was admitted to bail pending appeal by order of Asquith, J., the Judge in Chambers.

J. A. Boyd-Carpenter, for the appellant:

The person who purported to act as Deputy Recorder was not a barrister and was, therefore, not qualified to act by reason of the provisions of section 166 (1) of the Municipal Corporations Act, 1882. The proceedings were, therefore, wholly void from the outset, but it is submitted that an order of *venire de novo*, which begins with the words "therefore let a new jury come" is inappropriate in the present case. In CRANE *v.* PUBLIC PROSECUTIONS (DIRECTOR), 15 Cr. App. R. 183; [1921] 2 A. C. 299, the case was tried by a Court of competent jurisdiction, whereas in the present case there was no Court at all. Lord Sumner described the proceedings in that case as a mistrial and the proceedings there were not, as here, a nullity *ab initio*.

S. Cope Morgan, for the Crown:

Section 237 of the Act provides that "no defect in the appointment of a deputy under this Act shall invalidate his acts" and it is possible that that section may apply to a defect of the present kind. [He referred to MARGATE PIER CO. *v.* HANNAM (1819), 3 B. & Ald. 266.]

CHARLES, J.: This case comes before the Court in somewhat unusual circumstances. [His Lordship stated the facts and continued:] It is perfectly clear that, that error having been made, the Court of quarter sessions was never so constituted as to be empowered to try anyone at all for anything, and the proceedings were void *ab initio*.

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What is the proper course to take in order that this unfortunate mistake may be remedied? We think it should be remedied in the way referred to by Lord Finlay in CRANE *v.* PUBLIC PROSECUTIONS (DIRECTOR) when he said (15 Cr. App. R., at p. 199; [1921] 2 A. C., at p. 311): "Lord Reading, C.J., in giving judgment, after stating the course of the proceedings, said: 'At the trial, as we now know, both Morton and Crane were given in charge to the same jury, as if they had been jointly indicted under one indictment, whereas in truth there were separate indictments. The result is that there never has been a trial at all. It is sufficient for this Court to say that the proceedings were void *ab initio*. It has been argued that the proceedings were only irregular, and that where there was an irregularity in procedure, the Court could not treat the trial as a nullity. But that argument cannot be accepted. The Court must view the proceedings as if there had been no trial at all.'" It appears to this Court that the position in this case is the same, and we propose, therefore, to follow the same course as that taken by Lord Reading, C.J., in CRANE *v.* PUBLIC PROSECUTIONS (DIRECTOR) (*supra*), which was specifically approved by the majority of the House of Lords. To continue the quotation from Lord Reading, C.J.'s judgment, the learned Lord Chief Justice referred to BAKER (1912), 7 Cr. App. R. 217, INGLESON, 11 Cr. App. R. 21; [1915] 1 K. B. 512, GOLATHAN (1915), 11 Cr. App. R. 79, and WAKEFIELD, 13 Cr. App. R. 56; [1918] 1 K. B. 216, and continued: "These cases are, in our opinion, authority for the course which this Court proposes to take in this case, that is, to treat the verdict and sentence as a nullity. Following the course taken in BAKER (*supra*), the verdict and sentence are expunged from the record. That being so, there is the indictment against the appellant on which no trial has taken place. He must stand his trial on that indictment." The terms of the order are then set out, and this Court to-day makes an order in similar terms: "Upon consideration being

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this day had by the Court of Criminal Appeal, as duly constituted for the hearing of appeals under the Act, of the appeal of the above-named appellant against conviction, the Court doth finally determine the same, and doth order that the conviction and judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that the appellant do appear at the next quarter sessions . . . there to take his trial according to law upon the said indictment."

Boyd-Carpenter: In view of the publicity which this matter has obtained in Bury St. Edmunds, the Court is asked to direct that the trial shall take place at the next Ipswich Borough Quarter Sessions. The Court is asked also to continue the appellant's bail.

Cope-Morgan: The Crown raises no objection.

CHARLES, J.: The Court will continue the appellant's bail on the same terms as those on which bail was granted by the order of Asquith, J., and in view of the application of the appellant, which has been assented to on behalf of the Crown, we are prepared to allow the case to be tried at the next Ipswich Borough Quarter Sessions.

Order in nature of venire de novo.

Solicitors: Partridge & Wilson, Bury St. Edmunds, for the Crown.

BEFORE

MR. JUSTICE CHARLES, MR. JUSTICE MACNAGHTEN AND MR. JUSTICE OLIVER.

JOHN KINNEAR CARMICHAEL.

1940.
11, 19 *March.*

Incest—Father and Daughter—Defence of No Knowledge that Girl was Prisoner's Daughter—Exclusion of Evidence—Evidence Tending to Bastardise Child Born During Wedlock—Conviction Quashed—Punishment of Incest Act, 1908 (8 *Edw.* 7, *c.* 45), *s.* 1.

The appellant was charged with incest with S., who was alleged to be his daughter. His substantial defence was that he had no knowledge that the girl was his daughter. He desired to give evidence: (a) that he had been told by his first wife (the girl's mother) that S. had been begotten by another man, and that he believed that statement to be true; (b) that he had told his second wife that he was not the father of S.; (c) explaining statements which he had made on certain occasions acknowledging S. to be his daughter. All this evidence was excluded by the Judge at the trial, on the ground that it was evidence tending to bastardise a child born during wedlock and therefore offended against the rule in RUSSELL *v.* RUSSELL, [1924] A. C. 687. The appellant was convicted.

Held, that the evidence excluded was relevant to the issue whether the appellant knew that S. was his daughter; that the rule in RUSSELL *v.* RUSSELL (*supra*) did not preclude the appellant from giving any evidence relevant to that issue, including evidence of an admission by the appellant's first wife; and that, as it was impossible to say that the jury would have convicted if the excluded evidence had been admitted, the conviction must be quashed.

Appeal against conviction.

The following statement of facts is taken from the judgment:

On February 8, 1940, at the Central Criminal Court, before Wrottesley, J., the appellant was convicted of incest

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with his daughter, Sonia May Carmichael, and was sentenced to two years' imprisonment. The indictment contained three counts. The first count charged that on a date unknown, between June 1, 1932, and May 2, 1933, the appellant "had carnal knowledge of Sonia May Carmichael, who was to his knowledge his daughter". The second and third counts charged the commission of similar offences between August, 1934, and August, 1937.

There was little or no dispute as to the facts of the case. On September 2, 1912, the appellant married Frances May Parker at the register office at Edmonton, Middlesex, and there were two children of the marriage, namely, Elsie Frances Carmichael, born on April 11, 1913, and Sonia May Carmichael—the subject of the present charge—born on May 18, 1915. The appellant was admittedly the father of the elder daughter, Elsie Frances. Throughout the whole of 1914 the appellant's wife lived at Cambridge and the appellant resided in London, where he was engaged in a motor business, and during that year he used from time to time to visit his wife at week-ends. There was evidence that about August, 1914—nine months before the birth of Sonia May Carmichael—the appellant's wife was associating with a man named Harry West, who was giving her lessons in motor driving, but there was no evidence of any misconduct by her with West at that time.

In January, 1915, the appellant enlisted in the army and in the autumn of that year he went with his regiment to France. While the appellant was away in France his wife committed adultery with West, and on November 17, 1916, the appellant presented a petition for a divorce and cited West as co-respondent. The petition alleged that during 1916 Mrs. Carmichael had frequently committed adultery with West and that she was at that date pregnant by him. On this petition a decree *nisi* was pronounced and in due course the decree was made absolute and the marriage dissolved. On July 10, 1918, the appellant married a Miss

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Violet May Garrick. After the dissolution of his first marriage the two girls, Elsie and Sonia, lived under the care of the appellant's mother, but in 1926 they went to live with the appellant and his second wife. In 1932 the appellant and his wife quarrelled and separated. The rupture between them was due to the fact that Mrs. Carmichael became suspicious about the appellant's feelings towards Sonia. After this separation from his second wife the appellant lived with Sonia, and between the dates mentioned in the indictment she gave birth to three children. The appellant was admittedly the father of those children and there was ample evidence that on a number of occasions he had acknowledged that he was the father of Sonia. In his petition for divorce and in his affidavit verifying the petition he had stated that there was "living issue of the marriage, two children—namely, Elsie Frances Carmichael, born on April 11, 1913, and Sonia May Carmichael, born on May 18, 1915".

At the trial, Wrottesley, J., held that he was precluded by the decision in RUSSELL *v.* RUSSELL, [1924] A. C. 687, from admitting in evidence any statement either by the appellant or his first wife which tended to bastardise any issue of that wife born during her marriage with the appellant. The appellant appealed on the ground of wrongful exclusion of evidence.

Edward Clarke, for the appellant:

There were three elements in the charge which had to be proved by the prosecution: (i) that the appellant had intercourse with Sonia; (ii) that Sonia was his daughter; and (iii) that at the time when he had intercourse with her the appellant knew that she was his daughter. They sought to prove the third element by proving that on certain occasions the appellant had acknowledged Sonia to be his daughter and had made evasive statements to the police on this matter. The Judge was wrong in excluding evidence which

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the appellant desired to give to rebut the allegation of knowledge and in holding that the rule in RUSSELL *v.* RUSSELL (*supra*) rendered such evidence inadmissible. The rule applies only where the paternity of a child is in issue. It was first laid down by Lord Mansfield in GOODRIGHT *v.* MOSS (1777), 2 Cowp. 591, a case in which the issue was that of legitimacy. In a recent case, ETTENFIELD *v.* ETTENFIELD, [1940] P. 96, at p. 104, Goddard, L.J., referred to the rule as applying "where the paternity of a child is in question". The rule can have no application where the issue is knowledge or no knowledge, which was the issue in the present case. The difficulty that must arise from any attempt to apply the rule in RUSSELL *v.* RUSSELL (*supra*) to a charge of incest was foreshadowed by Lord Sumner, who was one of the two dissenting members of the House of Lords in that case ([1924] A. C., at p. 739), but he made no reference to the question of knowledge. [He referred also to HEMMINGS (1939), 27 Cr. App. R. 46.]

Gerald Howard, for the Crown:

In RUSSELL *v.* RUSSELL (*supra*) the issue was that of adultery, and it was decided in that case that the rule applies even though legitimacy is not the direct issue, but only arises indirectly. In the present case the evidence which tended to prove the appellant's lack of knowledge that the girl was his daughter also tended to bastardise a child born during wedlock, and was, therefore, properly excluded. It was open to the appellant to prove his lack of knowledge *aliunde*.

Edward Clarke, in reply:

The paternity of Sonia was never in issue in the present case, and therefore the rule in RUSSELL *v.* RUSSELL (*supra*) never came into play at all. Evidence of non-access is commonly admitted in cruelty cases, although it may incidentally tend to bastardise a child.

At the conclusion of the arguments, Charles, J., said that the Court was of the opinion that the appeal must be

allowed and the conviction quashed, and that reasons for the decision would be given at a later date.

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Cur. adv. vult.

March 19.—The judgment of the Court was read by

CHARLES, J., [after stating the facts set out above:] Incest was made a criminal offence by the Punishment of Incest Act, 1908, section 1 of which provides that: "Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour." It was, therefore, incumbent on the Crown to prove to the satisfaction of the jury: (1) that the appellant was in fact the father of Sonia, and (2) that he knew that he was her father. Proof that Sonia was in fact his daughter would not be sufficient to justify a conviction unless it was also proved that the appellant knew that she was his daughter. If the appellant could have proved to the satisfaction of the jury that he believed that she was not his daughter, or even if the jury had reasonable doubt about that matter, he would have been entitled to a verdict of acquittal.

The grounds of appeal against the conviction are as follows: (1) that the learned Judge was wrong in law in holding that the rule in RUSSELL *v.* RUSSELL (*supra*) applied to the case, and that no statement by the appellant or his first wife which tended to bastardise any issue of that wife born in wedlock could be admitted; (2) that the learned Judge misdirected the jury in his summing-up when he told them to disregard all statements made by the defendant or his first wife which tended to bastardise Sonia May Carmichael; and (3) that the learned Judge thus wrongly excluded vital evidence tending to show that the appellant did not know that Sonia May Carmichael was his own daughter.

This appeal, therefore, raises an interesting and important question with regard to the application on a trial for

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incest of the rule of law affirmed by the House of Lords in RUSSELL *v.* RUSSELL (*supra*), that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock.

The case for the appellant was this. Conceding that there was no evidence to rebut the presumption that he was the father of Sonia and that the Crown had proved that fact conclusively, the appellant desired to give evidence that his former wife had told him that Sonia was begotten by another man, that he honestly believed her statement to be true, and that, therefore, so far from knowing that Sonia was his daughter, he believed the contrary. As proof of the sincerity of his belief, he desired to give evidence that he had informed his second wife that he was not Sonia's father. Further, he desired to explain how it came about that in his divorce petition and on other occasions he had acknowledged Sonia as his daughter. The learned Judge, however, held that the rule in RUSSELL *v.* RUSSELL (*supra*) precluded the appellant from adducing any such evidence and the question at issue on this appeal is whether that ruling was right.

In our opinion that ruling was wrong. At the trial the question arose first when the appellant's second wife, who was called as a witness for the Crown, was giving evidence. Counsel for the appellant desired to ask her in cross-examination whether it was not the fact that the appellant had informed her that he was not the father of Sonia, and the learned Judge, after hearing the matter argued in the absence of the jury, held that the rule in RUSSELL *v.* RUSSELL (*supra*) made any such question inadmissible.

After the close of the case for the Crown, the appellant gave evidence on his own behalf. The learned Judge allowed counsel to ask the appellant this question: "At the time you had intercourse with Sonia did you know she was your daughter?" and to that question he replied: "I knew she was not my daughter". Directed, however, by the Judge that he must answer the question "Yes" or "No", he

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replied "No". Counsel then proposed to ask the appellant what were his reasons for disbelieving that he was the father of Sonia and formulated the following question: "Who first informed you that Sonia was not your daughter?" The answer to that question would have been that it was the mother of Sonia herself who gave him that information. The learned Judge, however, disallowed the question on the ground that the answer would infringe the rule in RUSSELL *v.* RUSSELL (*supra*).

With the greatest respect to the learned Judge, we think that the question was admissible. Evidence by the appellant that his wife had told him that he was not the father of Sonia was no evidence at all that he was not in fact her father, and would be irrelevant and inadmissible on the question of the paternity of the child. In our opinion, such evidence would not in any way infringe the rule in RUSSELL *v.* RUSSELL (*supra*). Although, however, it was irrelevant to the question of the paternity of Sonia, it was plainly relevant to the question whether the appellant knew that Sonia was his daughter, since, if the jury were satisfied (1) that Sonia's mother did, in fact, tell the appellant that he was not the child's father, and (2) that the appellant believed her statement to be true, they would be bound to return a verdict of acquittal. Indeed, by the exclusion of this evidence the appellant was deprived of the right to substantiate his plea that Sonia was not to his knowledge his daughter.

To preclude a defendant on his trial from giving evidence of his belief and the ground for it seems to us to deprive him of one of the most elementary rights of an accused person and to be a negation of justice where the proof of knowledge or no knowledge is vital to conviction or acquittal. The exclusion of this evidence, moreover, led to the curious result that, while the appellant was permitted to deny on oath that he knew Sonia to be his daughter, not only was he precluded from giving his reasons for believing that he was

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not her father, but the Crown was also precluded from cross-examining the appellant as to the reasons for his alleged belief. Furthermore, evidence of admissions by the appellant that Sonia was his child had been adduced on behalf of the Crown, yet statements to the contrary by the appellant which might have explained away those admissions were, by the ruling, excluded.

In our opinion, the rule in RUSSELL *v.* RUSSELL (*supra*) did not preclude the appellant from giving any relevant evidence in support of his plea that he did not believe that Sonia was his daughter, including evidence of an admission or confession by her mother.

It is true that Lord Sumner, in his dissenting speech in RUSSELL *v.* RUSSELL, [1924] A. C., at p. 739, suggested as a reason for differing from the majority of the House of Lords the hardship which the rule would work in an incest case, and instanced an example closely approximating the facts of this case. But it is to be observed that he treated the matter as if the words of the statute "who is to his knowledge his . . . daughter" formed no ingredient in the offence. Thus he said: "His one defence is that, though born of his wife during their marriage and brought up as his child to avoid scandal, he had not begotten her; she was a bastard of his wife's. If he can give this evidence he has a defence to go to the jury; if, on the other hand, the rule applies . . . he will go to prison."

In our opinion, the question whether A is B's daughter is totally distinct from the question whether to B's knowledge she is his daughter. Knowledge is vital to the commission of the offence.

While there was in this case evidence on which the jury might well have convicted the appellant, yet we cannot say that, if the evidence which was ruled out had been given, they would have done so, and we accordingly allowed the appeal and quashed the conviction.

Conviction quashed.

BEFORE

MR. JUSTICE HAWKE, MR. JUSTICE CHARLES AND MR. JUSTICE HILBERY.

WILLIAM CHARLES COWELL.

1940.
8 *April.*

Evidence—Statement by Prisoner—Dispute as to Admissibility—Right of Prisoner to Give Evidence on Preliminary Issue.

Where a dispute arises as to the admissibility of a statement by the prisoner, it is proper to allow the prisoner himself to be called as a witness on the issue of admissibility if the justice of the case makes it desirable that this should be done.

BALDWIN (1931), 23 Cr. App. R. 62, commented on.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on March 8, 1940, of murder and was sentenced by Humphreys, J., to death.

The case for the Crown rested largely on an alleged confession by the appellant. Counsel for the defence objected to the admission of the statement in evidence on the ground that it had been obtained by an inducement and was, therefore, not voluntary. Humphreys, J., heard evidence on the issue of admissibility in the absence of the jury. Counsel for the defence expressed some doubt, by reason of the decision in BALDWIN (1931), 23 Cr. App. R. 62, whether he was entitled to call the appellant to give evidence on this issue. The Judge ruled that he was entitled to do so, and the appellant accordingly gave evidence. After hearing the whole of the evidence on this issue, the Judge admitted the statement, but in his summing-up told the jury that he would leave it to them finally to decide whether the statement was true.

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Eric Neve, K.C. (*Alban Gordon*, for *C. J. T. Pensotti*, on war service, with him), for the appellant:

The statement ought not to have been admitted, as it was not voluntary, having been induced by the promise of a police officer that when the appellant had finished it—which would mean to the appellant, when he had finished his statement—he should be at liberty to go. Very slight inducement is sufficient to render a statement inadmissible. [He referred to FENNELL (1881), 7 Q. B. D. 147, at p. 156, and THOMPSON, [1893] 2 Q. B. 12.] Further, the Judge was wrong also in leaving it to the jury finally to say whether the statement was voluntary or not. [HILBERY, J.: But that was more than the appellant was entitled to. It gave him an extra chance of escape.]

John Flowers, K.C., and *G. A. Thesiger*, for the Crown, were not called on to argue.

HAWKE, J.—I do not think it is necessary to go into any of the facts proved in the course of this case. I only want to say that it must have become quite obvious at a very early stage to anybody connected with the matter that, but for the appellant's own statement, there was little, or even no, chance of his being convicted. There is no doubt in the mind of the Court that his conviction followed because his confession was so clear, and was, one may add, corroborated in the sense that in the course of it he said things which nobody but the murderer could have known.

Mr. Neve most properly, on instructions, took objection to the admissibility of this statement, and thereupon Humphreys, J., followed the usual practice and asked the jury to retire whilst he heard discussion whether this statement could be admitted or not.

During the discussion on the admissibility of this statement, the question arose whether the appellant himself could be called as a witness on the issue whether the statement was admissible or not. Mr. Neve himself, bowing to what

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he understood to be the law laid down in BALDWIN (*supra*), hesitated whether he could call the appellant. Humphreys, J., thought that he could, and indeed it is only fair to the learned Judge to say that he encouraged Mr. Neve to do so.

Whatever the case of BALDWIN (*supra*) may have decided, this Court is of opinion that in such circumstances it is proper to allow the prisoner himself to be called as a witness if the justice of the case makes it desirable that this should be done. Humphreys, J., took this view. He added that it would be permissible for counsel to go into all the circumstances before the jury with a view to determining the value of the statement in fact.

The Judge, after hearing the evidence, including that of the appellant, decided that the statement was admissible.

I may say, although the cases do not appear to have been reported, that this is a principle upon which my brother Hilbery and I myself have ruled on previous occasions that it was proper to permit the prisoner to be called in such circumstances.

We can find nothing wrong with this trial, and the appeal must be dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE HAWKE, MR. JUSTICE CHARLES AND MR. JUSTICE HILBERY.

SILVIO EDWARD FUSCHILLO.

1940.
15 *April.*

Receiving Stolen Property—Proof of Larceny—No Evidence Except Prisoner's Own Statements—Conviction Affirmed.

The appellant was the manager of a small shop in Bermondsey, which was owned by his mother. In the scullery and in a side passage leading from the scullery to

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the side door police officers had found 26 cwt. of sugar in sacks, which they believed to be stolen. The appellant on entering the shop said: "I'm a bloody fool. Don't bring the old lady into this," and later, after being cautioned: "I don't know why I took it in. I'm a bloody fool. This means going away," and: "Be satisfied and take it away, but don't take me." Apart from the appellant's own statements there was no evidence of the ownership of the sugar or of the fact that it had been stolen. The appellant was convicted of receiving the sugar well knowing it to have been stolen.

Held, that the evidence of larceny was sufficient, and that the conviction should be affirmed.

SBARRA (1918), 13 Cr. App. R. 118, applied.

Appeal against conviction and sentence

The appellant was convicted at the Central Criminal Court on March 11, 1940, of receiving stolen goods and was sentenced by the Recorder to eighteen months' imprisonment.

The appellant was manager of a small general shop in Bermondsey, which was owned by his mother. The allowance of sugar granted to him by the Food Executive Officer was $1\frac{3}{4}$ cwt. per week. Police officers searched the premises in the absence of the appellant and found in the scullery and in a side passage leading from the scullery to the side door twelve 2-cwt. sacks, and two 1-cwt. sacks, of granulated sugar. The appellant them came into the shop, and before being spoken to by the police, said: "My God, I'm a bloody fool. Don't bring the old lady into this, she knows nothing about it." A police officer then cautioned the appellant and, pointing to the sugar, said: "You have here 26 cwt. of sugar which I have reason to believe has been stolen." The appellant then said: "I don't know why I took it in. I'm a bloody fool. This means going away." The police officer said: "Do you care to tell me where it came from?" to which the appellant replied: "Be satisfied and take it away, but don't take me." The appellant was then arrested, and on his way to the police station said: "Can't we do some-

thing about this? For the old lady's sake take the stuff away and don't charge me." When charged, the appellant made no reply.

Apart from the above statements of the appellant, there was no evidence of the ownership of the sugar, the fact that it had been stolen, or the circumstances in which the appellant received it.

The Recorder overruled a submission by counsel for the defence, based on SBARRA (1918), 13 Cr. App. R. 118, that there was no evidence of the theft of the sugar and that the case ought to be withdrawn from the jury. The appellant did not give evidence at the trial.

E. J. P. Cussen, for the appellant:

There was no sufficient evidence to be left to the jury. The case is not an example of the kind of circumstances referred to by this Court in SBARRA, where Darling, J., who gave the judgment of the Court, said (13 Cr. App. R., at p. 120): "The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen." To hold that such evidence as was available to the prosecution in the present case is sufficient evidence of larceny would be tantamount to putting on the defence the onus to show that the goods were not stolen. One of the inferences which the jury might draw from the appellant's statements was that he was admitting that the goods were stolen and that he knew this, but there were many other inferences also which could be drawn, as, for example, that he was expressing concern lest he should be proceeded against for a breach of orders relating to rationing.

E. A. Hawke, for the Crown, was not called on to argue.

CHARLES, J.: This case presents somewhat unusual aspects with regard to the law relating to the receiving of goods well knowing them to have been stolen. There was no actual direct proof with regard to the ownership of the

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goods or the fact that they had been stolen, but it was argued by Mr. Hawke, who appeared for the prosecution at the Central Criminal Court also, that the case was akin to SBARRA (*supra*). The circumstances of that case were not exactly the same as the circumstances of this case, but it was laid down in that case: "The circumstances in which property is received may in themselves be sufficient proof that it was stolen and that defendant knew that fact."

It therefore becomes necessary to see what the circumstances in this case were. On October 2, 1939, an application to the Food Executive Officer for the district of Bermondsey was made by the appellant on behalf of his mother for leave to trade as a retailer in various commodities, including sugar, and in that application he declared that his stock of sugar at that date amounted to 5 cwt. He applied for 3 cwt. a week, but was granted an allowance of only $1\frac{3}{4}$ cwt. a week. [His Lordship then referred to the evidence of the appellant's statements to the police, which is set out above, and continued:] On his trial the appellant did not take advantage of the rule of law which allows a prisoner to give evidence on his own behalf.

It is suggested by Mr. Cussen, who has argued this appeal with great tenacity and ability, that the Court ought to say that there was no sufficient evidence for the jury to consider. We have come to the conclusion that there was ample evidence. With regard to the question of sentence, a police inspector gave evidence that there had been a large number of thefts of sugar from lorries, and the appellant has not had a good record, having already received a sentence of six months' imprisonment for receiving stolen eggs. The sentence was, therefore, a proper one.

The appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: Davis (J. Albert) & Co., for appellant.

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